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In the

Supreme Court of the United States

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL and SYBIL MEISEL, on behalf of themselves and all others similarly situated,

Petitioner,

v.

SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE FIRST BOSTON, CORP., MORGAN STANLEY DEAN WITTER, PAINEWEBBER INC., NATWEST SECURITIES, DEUTSCHE BANK ALEX BROWN, INC., COBURN & MEREDITH, INC., SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES, LLC, LAZARD FRERES & CO.,,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Particularly in the latter part of the 1990's, there were profits to be made from the acquisition of shares of stock in public securities offerings followed by a quick sale of those shares in the aftermarket. The practice is known as flipping. The lawsuit arises because underwriter/brokerage firms, defendants below, have allowed institutional investors to sell those shares at will while restricting the rights of millions of retail investors (individuals) to do the same. As a consequence of this restraint of trade, individuals pay the same for the shares as institutions, but receive less value because of liquidity restrictions. This action alleges that the restrictions violate antitrust laws. The court below held that the antitrust claims were barred by the implied immunity doctrine. It did so essentially because it concluded that the SEC had a latent power of oversight and that was sufficient to trigger application of the doctrine. This case presents the following questions:

1. Whether even in the absence of a clear repugnancy between the antitrust and other laws, implied immunity may obtain where an agency may have latent oversight power with respect to the challenged conduct?

2. Whether a court may ignore statutory requirements directing the SEC in its rule-making to consider and promote competition, and then write a rule allowing implied immunity that the agency had not?

3. Whether Exchange Act § 9(a)(6) saves the misconduct at issue from application of the antitrust laws?

PARTIES TO THE PROCEEDING

The parties to the case below, styled *Friedman, et al. v. Salomon/Smith Barney, Inc., et al.* are:

Alan Friedman, Sybil Meisel and Steven Langsom, Trustees u/w/o Benjamin Meisel, and Sybil Meisel,

Appellants,

and

Salomon/Smith Barney, Inc., Goldman Sachs, Merrill Lynch & Co., Inc., Credit Suisse, First Boston, Inc., Morgan Stanley, Dean Witter, Painewebber Inc., Natwest Securities, BT Alex Brown, Inc., Coburn & Meredith, Shamrock Partners Ltd., Prudential Securities Inc., Raymond James & Associates, Inc., Donaldson Lufkin & Jenrette, Legg Mason Wood Walker, Inc., Nations Banc Montgomery Securities LLC, Lazard Freres & Co., LLC and Morgan Keegan & Co.,

Appellees.

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PETITION FOR A WRIT OF CERTIORARI

Alan Friedman, Sybil Meisel and Steven Langsom, Trustees u/w/o Benjamin Meisel, and Sybil Meisel, individually and on behalf of all others similarly situated, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. 1a) is reported at 313 F.3d 796 (2d Cir. 2002). The district court's initial opinion (App. 19a) was reported at 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000); the reconsideration decision (App. 15a) was reported at 2001 WL 64774 (S.D.N.Y. Jan. 23, 2001).

JURISDICTION

Judgment of the court of appeals was entered on December 20, 2002. The court of appeals denied a petition for panel *en banc* rehearing on March 11, 2003. (App. 50a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY/REGULATORYPROVISIONS INVOLVED

Securities Exchange Act of 1934 15 U.S.C. §78(i)(a)(6) ("§9(a)(6)"); 15 U.S.C. §78c(f); 15 U.S.C. §78w(a)(2); and 17 C.F.R. § 242.104 ("Regulaton M"), are set out at App. 52a - 54a.

STATEMENT OF THE CASE

Petitioners respectfully suggest that this ease presents at least two questions worthy of *certiorari*. ***First***, underwriter/brokerage firms, defendants below, have allowed institutions freely to sell shares acquired in public offerings while inhibiting retail investors from doing the same. As a consequence, individuals pay the same for shares as institutions but receive less value because of the liquidity restrictions. A two judge panel of the court of appeals invoked the implied immunity doctrine to protect underwriters from restraint of trade liability for this. *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 803 (2d Cir. 2002), App. 14a. The outcome is completely at odds with an undisturbed wall of Supreme Court and appellate authority. Etched deeply there is the principle that immunity will be implied only where a clear repugnancy exists between the antitrust law and a statutory regime. No repugnancy exists here. To the contrary, the SEC had declared that its regulations governing trade restrictions during public offering *distributions* were *not* intended to approve the *aftermarket* activities complained of. The court of appeals nevertheless elevated mere and recent SEC awareness of the misconduct, and its latent but not unlimited oversight power to oversee the markets, into approval of the activities challenged and inoculation against antitrust consequence.

The holding thus establishes the extraordinary precedent that the mere existence of a possible agency reserve power of oversight implies immunity from antitrust law. The holding is the more egregious because the agency explicitly refused to immunize the activities at issue.

Second, the panel impermissibly stripped away statutory obligations imposed upon the SEC to consider antitrust impact and promote competition when rule-making under Section 9(a)(6). There is no indication whatsoever in this case that the SEC considered antitrust implications in the aftermarket that might result had it made a rule permitting the conduct complained of. To the extent a record exists, it shows that the SEC refused to condone the activities complained of in the aftermarket, and to the extent the Exchange Act has pertinent rules, they would be reinforced by application of antitrust provisions.

To solve these obvious failures to find a rule made in conformity with explicit statutory requirements, the court held that, because the SEC was required to consider public interest and protection of investors in addition to market competition in its rule-making, it therefore necessarily had met its statutory obligations to do that. *Friedman*, 313 F.3d at 802, App. 12a-13a. This, of course, gets matters backwards. It is precisely because the SEC is obliged to consider antitrust consequences that its record failure to have done so cannot be regarded as tantamount to a rule making for antitrust immunity. As a result, the court effectively wrote a rule of immunity that the agency had not, and did so without obedience to statutory mandate.

Together, the actions of the Second Circuit will have widespread impact on the scope of antitrust law with respect to activity that potentially falls under the oversight of any administrative agency. It already has.[1]

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[1] *E.g.*, *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003). *See also In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, No. 00 Civ. 7804

The decision itself affects the financial rights of millions of investors and further undermines confidence in the integrity of the marketplace.

A. The Activity Complained Of. Defendants are underwriter/brokerage firms. They have permitted institutional investors to "flip" shares acquired in public offerings, but have barred members of the investing public from doing so. "Flipping" involves disposing of the acquired shares in the aftermarket relatively soon after a public offering. In order to access the antitrust immunity doctrine, underwriter defendants herein disingenuously liken the bars in the aftermarket to "stabilization" and "penalty bids" regulated in connection with distributions of public offering shares.

Plaintiff is a member of class of retail investors who purchased shares of stock in public securities offerings and could not freely dispose of them in the aftermarket – up to 90 days following the distribution of the offering ("the retail restricted period").

As a consequence of this financial discrimination, individuals pay the same as institutions for those shares, but receive less because of the liquidity restrictions. It is beyond cavil that restricted securities are not worth what unrestricted counterparts are. The sales restrictions also artificially shrink the supply of shares, distort the supply/demand ratio, and artificially inflate the aftermarket prices of such securities, permitting institutional investors to sell profitably. No one

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(S.D.N.Y.) (LMM) (motion pending cites *Friedman* for antitrust immunity); *Initial Public Offering Antitrust Litig.*, No. 01 Civ. 2014 (S.D.N.Y.) (WHP) (same); and *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (S.D.N.Y.) (LMM) (same).

disputes the existence of the practice. No one suggests that the practice serves retail investors or promotes competition.

The SEC had *explicitly declined* to immunize this aftermarket misconduct. We pause to emphasize that the litigation does not attack underwriter conduct which stabilizes prices during public offering distributions. Those practices, when in connection with public offerings, are necessary for the benefit of investors, and are well regulated and approved of by the SEC. They are not at issue here. What petitioners challenge are selling restraints imposed by defendants *after* distribution in order to favor institutional clients at the expense of retail investors. The restraints are not legal, and have never been approved of by statute, rule, regulation, or juridical decision. There is no legal basis whatsoever for the proposition that stabilization rules during distributions implicitly authorize selling restrictions in the aftermarket.

B. The Opinion Below. The district court dismissed the complaint. It found that implied immunity existed because (1) the SEC has exclusive jurisdiction over price "stabilization" pursuant to Exchange Act §9(a)(6), which allows stabilization practices not specifically prohibited by the SEC; (2) Congress was aware of stabilization practices in 1934 when it passed the Exchange Act and created the SEC; (3) over 60 years the SEC actively studied and regulated stabilization power and made a "studied assessment that the benefits of price stabilization to the capital markets outweigh the admitted anti-competitive aspects of stabilizing manipulation"; and (4) there is clear conflict between the antitrust laws and SEC regulation under §9(a)(6). *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL

1804719, at *6 n.9, *11 (S.D.N.Y. Dec. 8, 2000), App. 40a-42a, 46a; 2001 WL 64774, at *1 (S.D.N.Y. Jan. 23, 2001), App. 17a.

The panel affirmed. In doing so, it equated price "stabilization" on "penalty bids" during *distribution* with selling restrictions in the *aftermarket*, calling the distinction "artificial." *Friedman*, 313 F.3d at 802, App. 12a. What the panel calls "artificial" is a distinction that the SEC itself acknowledges is important and real. The panel's disintegration of that distinction is a lynchpin of the holding. Without it, there is no trace of this aftermarket trade restraint or Commission consideration of it prior to the mid-1990's. And in the 1990's, the SEC explicitly declined to extend immunities from the distribution into the aftermarket period. The refusal to acknowledge the difference between distributions and aftermarkets is an event of such importance for application of laws and regulations covering the one period but not the other that, by itself, the question merits attention by this Court.

In addition, the panel *presumed* that the SEC has considered antitrust implications in the aftermarket that would arise from rule making covering "stabilization" merely because the agency is statutorily obliged to do so. App 12a-13a. There is no record evidence that the SEC did so. The most that accurately can be said of SEC activity in the aftermarket area is what the panel wrote: "[I]n its 1994 release, [the SEC] stated that 'stabilization' of the market in connection with offerings may have shifted from the sales period to the aftermarket period." *Id.* That whisper, breathed in the uncertain subjunctive voice, bears no likeness to the deliberate and substantial expressions contained in this Court's cases associated with implied immunity. And

that whisper was silenced by later, explicit SEC refusals to approve the aftermarket activities. *See infra* Part I.B. So, whatever the shift from distribution to aftermarket, the event is recent and has never been condoned by Congress or the Commission. To the contrary. *Id.*

Finally, held the panel, Exchange Act §9(a)(6) authorizes any "pegging, fixing or stabilizing" practices that the SEC does not explicitly prohibit, and the panel could not find a rule that explicitly prohibited the complained of activity. *Friedman*, 313 F.3d at 803, App. 14a. Such a construction would mean that, when enacting the statute in 1934, Congress gave broad *authorization* for *any* conduct that could plausibly be described as "fixing," including all manner of price fixing schemes, so long as the conduct had not yet attracted SEC regulation. At minimum, the panel ignores the many SEC rules and regulations that make price manipulations, fixing, and undisclosed profiteering illegal.[2] In short, the practices complained of are susceptible to challenge under the securities laws, and are not saved by 9(a)(6).

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[2] *See, e.g.*, Exchange Act Rules 10b-3, 10b-5, 10b-10, and 15c1-2. These rules implement explicit Congressional provision embodied by Exchange Act §§6(b)(5), 6(b)(8), 10(b), and 11A(a)(1)(C)(i) and (ii), 15 U.S.C. §§78f(b)(5), 78f(b)(8), 78j(b), and 78k-1(a)(1)(c)(i) and (ii), and are antagonistic to the acts complained of.

REASONS FOR GRANTING THE PETITION

1. Implied Immunity Doctrine . The decision effectively rewrites implied immunity doctrine to the financial detriment of millions of investors. Heretofore, this Court and others had held that "repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap." *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27 (2d Cir. 1985). "Repeal is to be regarded as implied only if necessary to make the [law or regulatory scheme] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981).

In *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975) (Stewart, J., concurring), the Court wrote:

> The Court has *never* held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found *only* if there exists a "plain repugnancy between the antitrust and regulatory *provisions*."

Id. at 692 (emphasis supplied) (citations omitted). The panel decision twice fails *Gordon*. Nothing in the decision, or in the record undergirding, demonstrates either repugnancy or provisions.[3]

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[3] The hurdles to establish such repugnancy are formidable.

The decision below thus violates and essentially re-writes these principles. And this monumental revision will have been done through the work of but two judges. The decision already has had profound influence on other cases advancing through the courts.[4]

The panel does not identify a real and genuine "plain repugnancy between the antitrust and regulatory provisions" essential to implied immunity. *Gordon*, 422 U.S. at 683; *see Nat'l Gerimedical*, 452 U.S. at 391 (no repugnancy and thus no immunity where misconduct neither compelled nor approved by governmental regulatory body); *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990) (same).

To imply a conflict, the panel invoked Exchange Act §9(a)(6). *Friedman*, 313 F.3d at 803, App. 13a. It provides in relevant part:

> "It shall be unlawful for any person, directly or indirectly ... [t]o effect either alone or with one or more other persons any series of transactions for the purchase

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Like the instant case, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), involved harmonizing the antitrust laws with the Securities Exchange Act of 1934. *Id.* at 342. "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.* at 357. Neither the SEC nor the Second Circuit panel for this appeal explained how a repeal of the Sherman Act with respect to the practices complained of is necessary to make Section 9(a)(6) or any other part of the Exchange Act "work." Indeed, like the Commodity Exchange Act at issue in *Strobl* (where this Court rejected implied repeal), the Exchange Act is "bristling with anti-manipulation provisions." 768 F.2d at 28; *see also supra*, note 2.

[4] *Supra*, note 1.

> and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of [SEC] rules."

App. 52a. It is beyond question that the practices complained of are not stabilization during distributions. They occur *after* IPO distribution, when stabilization has ceased. The SEC itself states in regulations and releases that stabilization is a distribution, not aftermarket, activity. *See infra.* Moreover, a slew of SEC rules prohibits fixing or manipulating prices in the aftermarket. *Infra* p. 17. This means that the challenge conduct does contravene § 9(a)(6).

Of course, there was the *possibility* that the Commission might someday introduce rules repugnant to the antitrust scheme.[5] But, prior to the decision below, it was settled that speculation does not support implied immunity. *See Gordon*, 422 U.S. at 682-83; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 220-21 (1966); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 376-77 (1973).[6]

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[5] Below, the SEC submitted a brief that acknowledged that the conduct complained of is illegal absent SEC immunity, and insisted that the SEC's latent authority was sufficient to confer that immunity. At the time, the SEC had no chairman. One of its commissioners served *inter regnum.*

[6] However, so offensive would approval of that practice be that any such provision might well go beyond what the SEC may do. *See, e.g,, American Postal Workers Union v. U.S. Postal Serv.*, 891 F.2d 304, 312-13 (D.C. Cir. 1989), *rev'd on other grounds sub nom. Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991) (quoting *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1496-97 (D.C. Cir. 1988)) (agency

Not surprisingly, since this decision dramatically expanded the reach of the implied immunity doctrine, implied repeal is being invoked with increasing regularity by Wall Street players accused of illegal conspiracies.[7]

2. Revision of Express Statutory Requirement. The Exchange Act expressly requires that, when engaged in rule making, the commission must both protect investors and "promote . . . competition." 15 U.S.C. §78c(f); 15 U.S.C. §78w(a)(2). App. 53a-54a. There is no record evidence that the SEC did so, and the panel engaged in a variation of *ad hoc propter hoc* by holding that, because the SEC was supposed to have engaged in that deliberative process, it actually did so. Thus, the decision below writes out from the statutory scheme a pair of requirements (investor protection and promotion of competition) that Congress mandated the SEC to consider before making the kind of rule that the panel implied.

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interpretation must be "rational and consistent with the statute"); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (judicial deference extends only to "reasonable" agency determinations).

[7] See cases collected at note 1.

I. THE COURT OF APPEALS HAS SIGNIFICANTLY CHANGED VENERABLE IMPLIED IMMUNITY DOCTRINE

A. Implied Immunity Standards . "Repeals of the antitrust laws by implication ... are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357. "[R]epeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap." *Strobl*, 768 F.2d at 27. Rather, implied repeal of Sherman Act can be justified "only by a convincing showing of clear repugnancy" between an overlapping regulatory scheme and the Act. *National Gerimedical*, 452 U.S. at 388.

B. Revision of Mutual Repugnancy Requirements . The Commission has approved of, and this litigation does not attack, what is called stabilization of prices in connection with offerings. Reg. M, 17 C.F.R. §242.104 (2003).[8] Offerings do not reach

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[8] Reg. M, 17 C.F.R. §242.104(a), provides in relevant part (emphasis added):

> Unlawful Activity. It shall be unlawful for any person, directly or indirectly, to stabilize, to effect any syndicate covering transaction, or to impose a penalty bid, *in connection with an offering* of any security, in contravention of the provisions of this section.

Additionally, 17 C.F.R. §242.100(b) defines penalty bid as follows:

> Penalty bid means an arrangement that permits the

"aftermarkets." They end with "distribution" of what is being offered.

The panel, however, held that the distinction between distribution and aftermarket is "artificial," *Friedman*, 313 F.3d at 802, App. 12a, and thus found that a conflict exists. Because the challenged flipping restraints that occur in the aftermarket of an offering are the same as stabilization, goes the panel's trope, and as the SEC regulates stabilization, those regulations must apply equally to the aftermarket. *Id.*[9] That was error.

"Stabilization" is "the buying of a security for the limited purpose of preventing or retarding a decline in its open market price in order to facilitate its *distribution* to the public." *Id.* at 801, App. 10a (Second Circuit decision, emphasis added). It is entirely legal, and not challenged here. Underwriters may *stabilize* the distribution with purchases of the stock pursuant to Exchange Act section 9(a)(6), *supra*. Regulation M provides rules applicable to underwriters with respect to those stabilizing transactions. 17 C.F.R. §242.104.

> managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

[9] "As technology has evolved and distributions have taken shorter and shorter periods of time, the problem of flipping – and its 'solution' of price stabilization – simply has spilled into the aftermarket as well as the distribution period," and "because Section 9(a)(6) permits some forms of price stabilization, it conflicts with the antitrust laws' blanket prohibition of the practices." *Id.*

However, no statute, rule, regulation, or decision approves of aftermarket reselling constraints which detriment retail investors, and the Second Circuit cited none.

In numerous releases, the SEC consistently confines "stabilization" to share distributions, where artificial *instability* arises from a massive supply of new equity flooding the marketplace. The first regulation to address the matter was "Stabilizing To Facilitate A Distribution." *See* Rule X-10B-7, *adopted in*, SEC Release No. 34-5194, 1955 WL 6368 (July 5, 1955). Regulation M itself equates "completion of the sales efforts [with] termination of formal stabilizing activities." *Trading Practices Rules Concerning Securities Offerings*, SEC Release Nos. 33-7282, 34-37904, 1996 WL 169456, at *33 (Apr. 11, 1996) (*cited in Friedman*, 313 F.3d at 802, App. 11a) (hereinafter "1996 SEC Release"). And the "distribution period ... extends from the time the issuer determines to go forward with the offering until all sales efforts end." 1996 SEC Release, at *8.

Nothing issued by the SEC or cited by the Second Circuit panel supports the proposition that the SEC has approved "stabilization" in the aftermarket, a distinct period that follows distribution.

The panel itself noted (App. 11a) that 1994 was the first time that the SEC seemingly became aware of a possible concerted practice (but not the discrimination) in the aftermarket. *Friedman*, 313 F.3d at 801-802. In that year, the SEC observed for the first time that "'stabilization' of the market in connection with offerings *may have* shifted from distribution to the aftermarket" *Id.*, App. 12a (emphasis supplied). Two

years later, the SEC made explicit that it was not approving of stabilization in the aftermarket, as it had during distribution.

Note first, though, that the SEC itself strongly distinguishes between distribution and aftermarket periods ("may have shifted from distribution to the aftermarket"). The SEC then posed questions for market participants concerning the propriety of regulation in the aftermarket period, Review of Antimanipulation Regulation of Securities Offerings, SEC Release Nos. 33-7057, 34-33924, 1994 WL 138672, at *15-16 (Apr. 19, 1994), and as we now show, *two years later, the SEC made explicit at once that it was not approving of those aftermarket activities, and that a meaningful distinction exists between distributions and aftermarkets.*

In 1996, again acknowledging the distinct nature of the aftermarket, the SEC determined *not* to propose regulations governing aftermarket manipulations, as it had for the distribution period by operation of Regulation M. "[T]he Commission at this time is not proposing to extend the price limitations of Rule 104 [Reg. M] to cover aftermarket activities." 1996 SEC Release, *supra*, at *34; SEC Proposed Rules, *Trading Practices Rules Concerning Securities Offerings*, 61 Fed. Reg. 17108-01, 17125 (Apr. 18, 1996) (hereinafter "1996 Proposals"). Obviously, had the SEC previously immunized these practices in the aftermarket, its pronouncement that it would not do so would have been both superfluous and inconsistent, and it makes mock of implied immunity doctrine to hold that an agency impliedly condoned what it explicitly refused to approve.

The substantive distinction between price

stabilization in the aftermarket and price stabilization during distributions also was explicit in the 1997 release ushering in Regulation M.

> In the Proposing Release [for Regulation M], the Commission expressed its view that syndicate short covering transactions and the imposition of penalty bids by underwriters are activities *that can facilitate an offering* in a manner similar to stabilization. *The Commission did not propose to extend the price conditions of Rule 104 to these aftermarket activities.*

Anti-manipulation Rules Concerning Securities Offerings, SEC Release Nos. 33-7375, 34-38067, 62 Fed. Reg. 520-01, 537 (Jan. 3, 1997) (emphasis supplied) (hereinafter "Final Rules Release"). Consistently, the release accompanying the final version of Regulation M also noted that the provisions applied to specific activities "*during a securities offering*," Final Rules Release, *supra*, 62 Fed. Reg. at 521, and the SEC also explicitly has declared that Regulation M did *not* reach "aftermarket" activities, *i.e.*, "the period immediately following the termination of former syndicate activity." 1996 Proposals, *supra*, 61 Fed. Reg. at 17124.

The foregoing *make clear both that the distinction between distribution and aftermarket is real and that the SEC explicitly declined to do in the aftermarket what the panel says the Commission has done impliedly.*[10]

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[10] To be sure, the Commission has extensively regulated in and around the aftermarket - without legalizing the challenged activity. But neighborhood play is not by itself grounds for antitrust immunity, which requires repugnancy. *See Strobl v. New York*

Finally, the panel invoked Exchange Act 9(a)(6) to imply a conflict. Both dispositive and startling is that the work of the antitrust laws in the aftermarket arena is consistent with SEC rules and regulations, which make illegal price manipulations, fixing, and undisclosed profiteering. *See, e.g.*, Exchange Act Rules 10b-3, 10b-5, 10b-10, 15c1-2, 17 C.F.R. §§ 240.10b-3, 240.10b-5, 240.10b-10, and 240.15c1-2. These rules implement explicit congressional provisions, including Exchange Act §§6(b)(5), 6(b)(8), 10(b) and 11A(a)(1)(C)(i) and (ii), 15 U.S.C. §§78f(b)(5), 78f(b)(8), 78j(b), and 78k-1(a)(1)(C)(i) and (ii), which reveal that the SEC knows how to enact regulation when it wants to.

That the Commission *might someday* introduce rules repugnant to the antitrust scheme does not support implied immunity in the absence of a present and clear repugnancy. *Supra*, note 6.

Moreover, even if 9(a)(6) permitted the practices, that by itself would not satisfy all conditions of implied immunity doctrine because the panel does not identify the "plain repugnancy between the antitrust and regulatory provisions" essential to implied immunity. *Gordon*, 422 U.S. at 683; *see Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 391 (1981) (no repugnancy and thus no immunity where misconduct neither compelled nor approved by governmental regulatory body); *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990) (same).

Mercantile Exch., 768 F.2d 22, 29 (2d Cir. 1985) (extensive regulation insufficient to find immunity in the absence of a direct conflict). Here, no one identifies any conflict, and certainly no conflict that cannot be resolved by decretal language preserving SEC powers to shape prospective relief, *infra* p. 20.

What the panel did cite in support of SEC historic approval does not stand for the proposition cited, and if anything makes stunningly clear that the court has dramatically parted company with settled implied immunity doctrine. If the panel decision escapes review, monitoring an activity earns immunity status. An SEC statement in 1940 that stabilization has "vicious and unsocial aspects requiring additional monitoring" is not contrary, because the SEC was not then addressing aftermarket restraints. Statement of the Commission and Separate Statement by Commissioner Healy on the Problem of Regulating the "Pegging, Fixing and Stabilizing" of Security Prices Under Sections 9(a)(2), 9(a)(6) and 15(c)(1) of the Securities Exchange Act, SEC Release No. 34-2446, 1990 WL 968 (Mar. 18, 1940), *cited in Friedman*, 313 F.3d at 801, App. 10a. Had it done so, no inference could be drawn that insulation from antitrust rules was required in order to make the Exchange Act work. Likewise, an SEC 1963 report merely *observed* that certain underwriters had combated flipping by depriving salespeople of commissions when shares were resold within 30 days, and by withholding subsequent IPO allotments from customers who flip. Report of the Special Study of the Securities Markets, H.R. Doc. No. 95, Part 1, 88th Cong., 1st Sess. 328 (1963), *cited in Friedman*, 313 F.3d at 801, App. 11a. Conclusively, in 1996 the SEC would not have written that it was not extending immunities from distributions to aftermarkets if it had done so already! *Supra*, p. 15. The court of appeals acknowledged that the most that could be said of the SEC's position regarding aftermarket trade restraints was that it would "monitor" it. *Friedman*, 313 F.3d at 802, App. 11a.

The absence of customary implied immunity

criteria here is also obvious from an examination of the facts of other decisions. In *United States v. NASD*, 422 U.S. 694 (1975), the issue was a restriction among defendants to maintain fixed resale prices for mutual fund shares in secondary markets. 422 U.S. at 694-95. Section 22(f) of the Investment Company Act of 1940 expressly approved that conduct, 15 U.S.C.A. §80a-22(d), and all agreed that this provision was "designed to restrict most of secondary market trading" because it had been conducted in a way that "did not benefit the investing public generally." *Id.* at 700, 707.

The Court thus found that "the statute reflects a clear congressional determination." *Id.* at 727. It also found that the SEC "repeatedly has recognized the role of private agreements in the control of trading practices in the mutual-fund industry." *Id.* The Court held that "implied repeal of the antitrust laws is 'necessary to make the (regulatory scheme) work.'" *Id.* at 734 (citation omitted). None of these conditions is here.

In *Gordon*, plaintiffs challenged fixed broker commission rates established by the New York and American Stock Exchanges. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 660 (1975). Pursuant to explicit Congressional authorization to fix and insure "reasonable" commission rates, derived from section 19(b) of the Exchange Act, *see id.* at 666, the SEC passed comprehensive rules that phased out fixed rates in favor of competitive rates, taking competitive effects into account, among other concerns. *Id.* at 676-677, 680. Again, none of those conditions exists here.

Finally, implied immunity was not necessary here to assure that the SEC could regulate the challenged practice sometime in the future. In *In re Stock*

Exchanges Options Trading Antitrust Litigation, 2001 WL 128325 (S.D.N.Y. Feb. 15, 2001), the SEC itself recommended that concerns of impingement on the SEC's prospective powers can be eliminated so long as "[a]ny forward looking decree entered by an antitrust court ... take[s] account of that [SEC] authority." 2001 WL 128325, at *9. Thus, the remedy lies in the language used to frame prospective relief, not in immunization of prior wrongdoings. *See also Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 84 n.9 (2d Cir. 1981).

II. THE COURT OF APPEALS DECISIONNEGATES STATUTORY REQUIREMENTS THAT THE SEC CONSIDER AND RECORD THE COMPETITIVE IMPACT OF ITS RULE-MAKING.

The Second Circuit panel acknowledges that "Section 9(a)(6) requires the SEC to consider other factors such as the public interest and protection of investors in addition to market competition" and "the agency must consider the competitive effects of its regulations." *Friedman*, 313 F.3d at 802, App. 12a. But, without pertinent citation, the panel simply concludes that "[t]he agency was aware of the antitrust implications of stabilization practices and the potential for direct conflict" in 1940 when it issued Release No. 34-2446. *Id.*, App. 13a. Most obviously, the SEC would not have written in 1996 that it was not extending restraint allowances during distributions if it had done so already, *supra*.

The Second Circuit panel thus negated any statutory obligation of the SEC to promote competition in connection with its rule making. The demand that

any such consideration be built on a written record is necessary because "only deliberate and obvious agency action can insure that opposing views are presented and considered by the regulators and that a record is made on which agency decisions can be reviewed judicially, legislatively, or professionally." Phillip E. Areeda & Herbert Hovenkamp, IA *Antitrust Law* §243d, at 44 (2d ed. 2000). *See also Smiley v. Citibank*, 517 U.S. 735, 741 (1996) (courts may deny deference to unsupported agency position because "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect").

Neither the panel nor defendants ever advanced the proposition in this case that the SEC had *approved* the aftermarket anti-flipping restraints challenged in the complaint. Yet, had the SEC done so, even "[a]ctual agency approval of conduct submitted to it may confer an antitrust immunity ... only when the agency's decision takes competitive consequences into account." Areeda & Hovenkamp, §242 c.l. at p. 32; *Nat'l Gerimedical*, 452 U.S. at 390 ("antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity"). The panel effected what the SEC had not – a rule immunizing this aftermarket misconduct.

The 1940 Release No. 34-2446 cited by the panel addressed the manipulative aspects of underwriter stabilization practices during offering distributions. It did not discuss potential antitrust consequences arising from regulation of stabilization, and contains no analysis regarding competitive burdens from extension of the contemplated regulation, which eventually became Regulation M, from distribution into the offering

aftermarket.

Neither Regulation M nor any predecessor regulations contain in a "statement of basis and purpose" reasons for burdening competition with aftermarket selling restraints, or even justifications for competitive burdens associated with stabilization. These requirements have been written out of the statutory scheme by the panel decision. Nor is there anything to indicate the SEC has considered the discriminatory nature of the conduct. Such an approach offends Congress' requirement that the SEC minimally document its intention to burden competition before courts should infer a repeal. Courts are meant to implement statutes, not legislate them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(any footnotes trail end of each document)

Docket No. 01-7207

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL and SYBIL MEISEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE FIRST BOSTON, CORP., MORGAN STANLEY DEAN WITTER, PAINEWEBBER INC., NATWEST SECURITIES, DEUTSCHE BANK ALEX BROWN, INC., COBURN & MEREDITH, INC., SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES, LLC, LAZARD FRERES & CO., LLC, and MORGAN KEEGAN & CO.,

Defendants-Appellees.

December 11, 2001, Argued

December 20, 2002, Decided

COUNSEL: ROGER KIRBY, Kirby McInerney & Squire LLP (Alice McInerney, Randall K. Berger, W. Mark

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David M. Becker, General Counsel, Securities and Exchange Commission (Meyer Eisenberg, Deputy General Counsel, Mark Pennington, Assistant General Counsel, on the brief) Washington, DC, for amicus curiae Securities and Exchange Commission.

JUDGES: Before: OAKES and POOLER, Circuit Judges. *

OPINIONBY: POOLER

OPINION: POOLER, Circuit Judge:.

Plaintiffs Alan Friedman, et al., appeal from the December 11, 2000, judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) dismissing their class action complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs alleged that defendants participated in a price-fixing scheme concerning the sale of securities in violation of federal antitrust laws. The district court correctly held, however, that defendants' action enjoys implied immunity from antitrust laws because the antitrust laws conflict with securities regulatory provisions.

BACKGROUND

Plaintiffs are a class of retail investors who bought stock in public offerings. Plaintiffs are buyers. Defendants are underwriters and brokerage firms that manage public offerings through which they distribute shares of stock. Defendants are sellers. According to plaintiffs, defendants do not permit plaintiffs to re-sell their public offering stock during a prescribed "retail restricted period" of between 30 and 90 days after the initial offering distribution. First Am. Compl. at PP 2.b, 3. This retail restricted period occurs in the "aftermarket," which concerns any sales after the initial distribution. The re-sale of stock shortly after purchasing it in a public offering is known as "flipping." Generally, flipping causes stock prices to fluctuate - usually downward - and aftermarket sales restrictions are a form of price stabilization. According to plaintiffs, stock that institutional investors purchased from the same public offerings is not subject to aftermarket sales restrictions. Id. at P 4. Plaintiffs also claim that defendants do not disclose the restrictions in an offering's registration statement or prospectus. Id. at P 2.b.

Plaintiffs allege a conspiracy beginning in approximately 1990 among defendants to impose the restrictions on retail investors. According to plaintiffs, defendants discourage flipping but do not strictly forbid the practice. Instead, defendants enforce the retail restricted period by denying stock allocations in future public offerings to retail investors who previously flipped stock. Defendants also enforce the retail restricted period by denying or restricting stock allocations or commissions to brokers whose retail customers engage in flipping. First Am. Compl. at PP 60, 63. Defendants monitor stock sales and flipping on a customer-by-customer basis through the Depository

Trust Co., "a clearing house for the settlement of securities traded on all major exchanges and the NASDAQ system." Id. at P 8.

Plaintiffs contend that defendants' practice artificially drives up the price of stock in the aftermarket by restricting the supply of shares. Plaintiffs also contend that the practice causes them to pay inflated prices for shares during the initial distribution of public offering stock. According to plaintiffs, institutional investors benefit from defendants' practice because they can re-sell their shares at a higher price in the aftermarket. First Am. Compl. at P 4. Defendants also benefit from the scheme by, among other things, receiving more business and even kickbacks from institutional investors. Plaintiffs also note that defendants benefit from the artificially high prices because they do not have to spend as much of their own capital to support the price of public offering shares, and defendants attract future business based on the stock price performance of current public offerings. Id. at P 11.e.

Plaintiffs filed a class action lawsuit in federal court on August 21, 1998, alleging a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs also alleged a cause of action under New York law for breach of fiduciary duty. Plaintiffs filed an amended complaint on March 10, 1999, and defendants moved to dismiss it pursuant to Rule 12(b)(6). After hearing oral argument, the district court granted defendants' motion in a Memorandum and Order in December 2000. Friedman v. Salomon/Smith Barney, Inc., 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000) ("Friedman I"). In addition to dismissing plaintiffs' federal claim on the merits, the district court dismissed their state law claim by declining to exercise supplemental jurisdiction over it. 2000 U.S. Dist. LEXIS

17785, [WL] at *12. Plaintiffs moved for reconsideration, and the district court denied the motion in a January 2001 Memorandum and Order. Friedman v. Salomon/Smith Barney, Inc., 2001 U.S. Dist. LEXIS 884, 2001 WL 64774 (S.D.N.Y. Jan. 23, 2001) ("Friedman II"). Plaintiffs now appeal. Our review is de novo. Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994).

DISCUSSION

Both parties agree that the only issue on appeal is whether defendants' conduct is immune from antitrust enforcement based on the regulatory authority and actions of the Securities and Exchange Commission ("SEC"), principally under Section 9(a)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78i(a)(6). n1 The relevant legal doctrine is known as implied immunity. The parties also agree that the SEC has not regulated price stabilization in the aftermarket, but they draw opposite inferences from this circumstance.

According to plaintiffs, defendants' conduct does not benefit from the shield of implied immunity because the SEC's failure to regulate the manipulation of stock prices in the aftermarket is not the product of its consideration of antitrust or competitive concerns, and the SEC never has implied or held that defendants' conduct was permissible. Plaintiffs also argue that because defendants' conduct is anti-competitive, applying antitrust laws would reinforce the purpose of the Exchange Act rather than subject defendants to conflicting directives of securities and antitrust laws. Defendants and amici contend that the SEC has exercised its statutory authority in permitting - through the deliberate absence of regulation - defendants' conduct, so punishing that same conduct under antitrust

principles would create an impermissible conflict.

I. Implied immunity

The doctrine of implied immunity rests on three Supreme Court cases: Silver v. New York Stock Exch., 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963), Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975), and United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975) ("NASD"). Generally, courts should not abrogate antitrust laws through implied immunity, also known as implied repeal or revocation, "casually" because "repeal by implication is not favored." Finnegan v. Campeau Corp., 915 F.2d 824, 828 (2d Cir. 1990) (quotation marks and citation omitted). Implied immunity will exist "only where there is a plain repugnancy between the antitrust and regulatory provisions." Id. (quotation marks and citation omitted). "Repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap." Strobl v. New York Mercantile Exch., 768 F.2d 22, 27 (2d Cir. 1985). Importantly, the "plain repugnancy," or conflict, between antitrust and securities laws extends to potential as well as actual conflicts. Id.

As the district court below recognized, implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law. See Friedman I, 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719, at *4-5 (listing relevant factors to implied immunity analysis). In their arguments on appeal, the parties largely compare the case at bar to the facts of prior cases, making a brief review of those cases helpful here.

In Finnegan, we found implied immunity where a direct conflict existed between antitrust law, which would prohibit joint takeover bidders, and the Williams Act, 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f), which allowed competing bidders to make joint bids as long as they complied with SEC disclosure regulations. Finnegan, 915 F.2d at 829-31. In light of the direct conflict, implied immunity was necessary for the "proper functioning of the securities laws." Id. at 831. In Finnegan, we held that "we cannot presume that Congress has allowed competing bidders to make a joint bid under the Williams Act and the SEC's regulations and taken that right away by authorizing suit against such joint bidders under the antitrust laws." Id. at 830.

In Strobl, we found that no implied immunity existed where both the Sherman Act and Commodity Exchange Act forbid price manipulation, although the Sherman Act called for greater damages. Strobl, 768 F.2d at 27-28. Key to that decision was the absence of conflict or repugnancy between the legal schemes and the fact that "there is no built-in balance in the regulatory scheme of the [Commodity Exchange] Act that permits a little price manipulation in order to further some other statutory goal." Id. at 28. Thus, both sets of laws had the same goal and considered the same factors to reach that goal. Note that the Exchange Act, which governs our decision here, differs from the Commodity Exchange Act because the former allows "a little price manipulation" to further goals such as efficiently raising capital through new issues. See 15 U.S.C. § 78i(a)(6); see also S. Rep. No. 34-792, at 8-9, 17 (1934), SEC Release No. 34-2446, at 10-11 (March 18, 1940).

In NASD, the Supreme Court found implied immunity where the Investment Company Act of 1940, 15 U.S.C. § 80a-22(f), gave the SEC power to authorize sales and

distribution restrictions on the transfer of mutual fund shares in secondary markets even though the same restrictions were anti-competitive under the antitrust laws. NASD, 422 U.S. at 729-30. The facts in NASD are analogous to the case at bar because the statute in NASD "authorizes funds to impose transferability or negotiability restrictions, subject to [SEC] disapproval." Id. at 726. Here, Section 9(a)(6) of the Exchange Act authorizes price stabilization mechanisms subject to SEC disapproval. 15 U.S.C. § 78i(a)(6). The Supreme Court found that "there can be no reconciliation of [the SEC's] authority under Section 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal per se," even though the SEC had not specifically approved the restrictive agreements. Id. at 729-30.

In Gordon, the Supreme Court found implied immunity where the SEC under Section 19(b) of the Exchange Act, 15 U.S.C. § 78s(b), had jurisdiction to establish a system of fixed commission rates on the New York Stock Exchange. Gordon, 422 U.S. at 691. The Court did not concern itself with the "wisdom of fixed rates" but considered only Congress' intent that the SEC and not antitrust laws address the issue. Id. at 688. Again, the Court focused on conflict, holding that "different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." Id. at 689.

In contrast to Gordon and NASD, in the earlier case Silver the Supreme Court found no implied immunity because applying antitrust principles to New York Stock Exchange rules that lay outside the SEC's jurisdiction created no conflict. Silver, 373 U.S. at 358. Because the

Exchange Act at that time did not give the SEC power to "review particular instances of enforcement of exchange rules," id. at 357, applying the antitrust laws to effect that review did not affect the function of the Exchange Act, particularly because nothing in the SEC regulatory scheme at the time performed the "antitrust function" of considering injuries to competition. Id. at 358-59. The Court noted that if the SEC had jurisdiction over review of exchange rules "a different case as to antitrust exemption would be presented." Id. at 360. After Silver was decided, Congress amended the Exchange Act to require the SEC to take competition, among other things, into account in rulemaking and when reviewing rules of exchanges. See 15 U.S.C. §§ 78c(f), 78w(a)(2).

Thus, implied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct. In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it. Strobl, 768 F.2d at 27.

II. Application of legal standard

In a thorough and comprehensive opinion, the district court found that implied immunity existed here because (1) the SEC has exclusive jurisdiction over price stabilization pursuant to Section 9(a)(6), which allows stabilization practices not specifically prohibited by the SEC; (2) Congress was aware of stabilization practices when it passed the Exchange Act and created the SEC in 1934; (3) the SEC actively studied and regulated

stabilization practices over the last 60 years and consistently made a "studied assessment that the benefits of price stabilization to the capital markets outweigh the admitted anti-competitive aspects of stabilizing manipulation;" and (4) there is a clear conflict between plaintiff's reading of antitrust laws and SEC regulation under Section 9(a)(6). Friedman I, 2000 U.S. Dist. LEXIS 17785, 2000 WL 1804719, at *11-12; Friedman II, 2001 U.S. Dist. LEXIS 884, 2001 WL 64774, at *1. These holdings rest on proper interpretation of Section 9(a)(6) and analysis of the history of SEC regulation of price stabilization practices.

We examine briefly the SEC's regulation of price stabilization in both the distribution and aftermarket phases of public offerings. As noted previously, at the time Congress passed the Exchange Act, it declined to prohibit pegging, fixing or stabilizing practices outright and instead gave the SEC authority to regulate them. In 1940, the SEC issued its first policy statement about the practices, did not prohibit stabilization during distribution, and adopted regulations in an attempt to balance the interests of individual investors and "protection of the nation's credit and banking structure and the health of its capital markets." SEC Release No. 34-2446, at 10, 14. The SEC acknowledged that stabilization, "broadly defined as the buying of a security for the limited purpose of preventing or retarding a decline in its open market price in order to facilitate its distribution to the public," was a long-standing market practice with some "vicious and unsocial aspects" requiring additional monitoring in light of the new regulations. Id. at 3, 14. The SEC also pointed out that stabilization tended to combat the serious problem of flipping. Id. at 5.

In 1955 and 1963, the SEC revisited the stabilization issue and modified existing regulations but did not prohibit the practice. See SEC Release No. 34-5194 (July 5, 1955); H.R. Doc. No. 95, Pt. 1 (1963). In its 1963 report to Congress, the SEC pointed out that various firms combated flipping by depriving salespeople of their commissions "if resales by customers occur within 30 days of the effective date," by identifying "customers who sold stock in the immediate after-market" and declining to give these customers "allotments of subsequent oversubscribed issues," and telling customers "not to sell for varying periods, usually 30 or 60 days." H.R. Doc. No. 95, Pt. 1, at 525-26. The SEC nonetheless declined to regulate or prohibit the practices.

More recently, the SEC in 1994 undertook a comprehensive review of its trading practice rules and posed several questions dealing specifically with flipping in the aftermarket and whether a need existed to regulate the practice. SEC Release Nos. 33-7057, 34-33924, at 1316-17 (April 19, 1994). The SEC rule that resulted from this inquiry did not regulate price stabilization in the aftermarket. See 17 C.F.R. § 242.104 ("Regulation M"). In its release describing its new regulation, the SEC noted that stabilization in the aftermarket to combat flipping was "not uncommon and may act to support the price of the offered security in the aftermarket." SEC Release Nos. 33-7282, 34-37094, at 1740 (April 11, 1996). The commenters were "divided" over whether to regulate stabilization in the aftermarket, and the SEC chose instead to gather information, monitor aftermarket practices and "assess[] whether further regulation is warranted." Id.

Defendants argue that this history demonstrates that the SEC studied price stabilization and flipping

repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain. Plaintiffs dispute the import of this history. First, plaintiffs argue that price stabilization in the aftermarket is a recent phenomenon beginning in the 1990s, so there is no way that Congress in 1934 or the SEC until just recently could have studied the issue. Thus, plaintiffs contend, the history we recounted above is essentially meaningless. We disagree. Plaintiffs rely on an artificial distinction between price stabilization in the aftermarket and price stabilization during distributions. There is no question that underwriters and brokers consistently employed some form of price stabilization to deter flipping. The practice pre-dated the Exchange Act and the SEC. As technology has evolved and distributions have taken shorter and shorter periods of time, the problem of flipping - and its "solution" of price stabilization - simply has spilled into the aftermarket as well as the distribution period. The SEC explicitly recognized this trend in its 1994 release, when it stated that "'stabilization' of the market in connection with offerings may have shifted from the sales period to the aftermarket period." SEC Release Nos. 33-7057, 34-33924, at 1316. The SEC still declined to regulate price stabilization in the aftermarket when it adopted Regulation M, and we find this decision to be both deliberate and significant. Plaintiffs cannot contend that this latest action concerned only distributions and not the aftermarket.

Second, plaintiffs claim that no conflict exists here because application of antitrust laws would reinforce the Exchange Act's hostility to price manipulation. Plaintiffs argue that the SEC has not considered the antitrust implications of price stabilization. However, the agency must consider the competitive effects of its regulations. See 15 U.S.C. §§ 78c(f), 78w(a)(2). Contrary

to plaintiffs' contention, this case is unlike Strobl, where both the securities and antitrust laws imposed a categorical prohibition on price manipulation, Strobl, 768 F.2d at 28, because here Section 9(a)(6) requires the SEC to consider other factors such as the public interest and protection of investors in addition to market competition. The SEC has considered these factors in deciding not to regulate price stabilization in the aftermarket. Moreover, because Section 9(a)(6) permits some forms of price stabilization, it conflicts with the antitrust laws' blanket prohibition of the practices. The SEC also indicated in its 1940 release that its power to regulate stabilizing under the Exchange Act was broad and exclusive and that anti-competitive practices were lawful in the absence of SEC regulation. SEC Release No. 34-2446, at 12-14. The agency was aware of the antitrust implications of stabilization practices and the potential for direct conflict.

Third, plaintiffs argue repeatedly that the SEC has specifically declined to regulate the aftermarket and the absence of this regulation means that courts can enforce the antitrust laws against defendants without the danger of a conflict. Plaintiffs also contend that the possibility of future SEC aftermarket regulation is insufficient to sustain a finding of implied immunity. Plaintiffs' argument rests on a misinterpretation of Section 9(a)(6), which the district court addressed in its order denying plaintiffs' motion for reconsideration. On that motion and on appeal, plaintiffs argue that the district court misread the "plain words" of Section 9(a)(6) and "turned [the section] on its head by an interpretation directly opposite its plain meaning." It is plaintiffs that have given an opposite meaning to Section 9(a)(6).

The statute clearly provides that price stabilization in contravention of SEC regulations is unlawful. 15 U.S.C.

§ 78i(a)(6). As the district court correctly found, the statute allows price stabilization practices that the SEC does not prohibit. Friedman II, 2001 U.S. Dist. LEXIS 884, 2001 WL 64774, at *1. Plaintiffs reach the opposite conclusion - that the statute prohibits all price stabilization practices that the SEC does not specifically allow - because only this interpretation permits plaintiffs to construe the SEC's failure to regulate the aftermarket as leaving a space for antitrust laws to fill. Plaintiffs' misinterpretation of Section 9(a)(6) is the core of their position on appeal because all of their arguments against implied immunity flow from this view of the statute. But once the correct interpretation of Section 9(a)(6) is in place - the interpretation that the district court and defendants espouse - a finding of implied immunity is the direct consequence. We therefore affirm the district court's ruling that implied immunity bars plaintiffs' challenge to price stabilization practices in the aftermarket.

CONCLUSION

For the forgoing reasons, we affirm the judgment below in its entirety. Because we hold that implied immunity bars plaintiffs' claim, we do not reach defendants' alternative argument that the complaint alleges no antitrust injury because plaintiffs bought their shares at the same price as institutional investors and are free to sell them in the aftermarket.

98 Civ. 5990 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ALAN FRIEDMAN, MENDEL GROUP, INC., SYBIL MEISEL and STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL, and SYBIL MEISEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

- against -

SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE, FIRST BOSTON, INC., MORGAN STANLEY, DEAN WITTER, PAINWEBBER INC., NATWEST SECURITIES, BT ALEX BROWN, INC., COBURN & MEREDITH, SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES LLC, LAZARD FRERES & CO., LLC and MORGAN KEEGAN & CO.,
Defendants.

January 22, 2001, Decided

January 23, 2001, Filed

COUNSEL:
For ALAN FRIEDMAN, plaintiff: Alice McInerney, Ira M. Press, Kirby McInerney & Squire, L.L.P., New York, NY.

For NATWEST SECURITIES, defendant: John F. Cambria, Salans Hertzfeld Heilbronn Christy & Viener, New York, NY.

For SYBIL MEISEL, STEVEN LANGSOM, plaintiffs: Alice McInerney, Kirby McInerney & Squire, LLP, New York, NY.

For RAYMOND JAMES & ASSOCIATES, INC., LEGG MASON WOOD WALKER, INC., MORGAN KEEGAN & CO., defendants: Charles O. Monk, Saul, Ewing, Weinberg & Green, Baltimore, MD.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs' motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) and Local Rule 6.3 is denied. Plaintiffs have failed to demonstrate that this Court overlooked controlling legal authority or factual matters that might reasonably have been expected to alter our opinion. Nevertheless, we take this opportunity to clarify two issues raised by plaintiffs in their brief.

First, plaintiffs argue that this Court erroneously believed Regulation M regulated the conduct challenged in plaintiffs' suit, i.e. post-distribution conduct, and

based our finding of implied immunity, in part, on this misunderstanding. This Court was under no such misapprehension. Regulation M was not cited for the proposition that it directly regulated the conduct plaintiffs challenge. Rather, it was cited as the most recent in a long line of SEC decisions not to regulate the challenged conduct, following careful consideration of both distribution and "aftermarket" practice. Order at 29-31.

Second, plaintiffs' Regulation M argument reflects a misunderstanding of the law of implied immunity. Plaintiffs' briefs in opposition to the motion to dismiss and for reconsideration ignore the established principle that implied immunity may be found not only where an administrative agency has regulated, but also where it has scrutinized conduct over which it has clear regulatory authority and has consciously chosen to allow the conduct to continue unregulated. See Order at 13 (citing United States v. National Ass'n of Sec. Dealers Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)("NASD"); Finnegan v. Campeau Corp., 915 F.2d 824, 827 (2d Cir. 1990)). This principle is especially applicable where, as here, Congress has chosen to allow a class of practices to exist, subject to SEC regulation, which would otherwise likely run afoul of antitrust laws. Without the implied immunity principle of NASD and Finnegan, the SEC would effectively have to approve, explicitly, all practices it did not want outlawed. This result would flip Section 9(a)(6) on its head – prohibiting all "pegging, fixing or stabilizing" practices not specifically allowed by the SEC, instead of allowing those practices not prohibited by the SEC, as Congress intended.

Accordingly, as earlier stated, plaintiffs' motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) and Local Rule 6.3 is denied.

IT IS SO ORDERED.

DATED: New York, New York

January 22, 2000

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

98 Civ. 5990 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ALAN FRIEDMAN, MENDEL GROUP, INC., SYBIL MEISEL and STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL, and SYBIL MEISEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

- against -

SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE, FIRST BOSTON, INC., MORGAN STANLEY, DEAN WITTER, PAINWEBBER INC., NATWEST SECURITIES, BT ALEX BROWN, INC., COBURN & MEREDITH, SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES LLC, LAZARD FRERES & CO., LLC and MORGAN KEEGAN & CO.,
Defendants.

December 7, 2000, Decided
December 8, 2000, Filed

COUNSEL: For ALAN FRIEDMAN, plaince. Alice McInerney, Kirby McInerney & Squire, L.L.P., New York, NY. Ira M. Press, Kirby McInerney & Squire, L.L.P., New York, NY.

For NATWEST SECURITIES, defendant: John F. Cambria, Salans Hertzfeld Heilbronn, Christy & Viener,

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For SYBIL MEISEL, STEVEN LANGSOM, plaintiffs: Alice McInerney, Kirby McInerney & Squire, LLP, New York, NY.

For RAYMOND JAMES & ASSOCIATES, INC., LEGG MASON WOOD WALKER, INC., MORGAN KEEGAN & CO., defendants: Charles O. Monk, Saul, Ewing, Weinberg & Green, Baltimore, MD.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY: NAOMI REICE BUCHWALD

OPINION: MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs, Allen Friedman, Mendel Group, Inc., Sybil Meisel and Steven Langsom, Trustees u/w/o Benjamin Meisel and Sybil Meisel ("plaintiffs") bring this class action on behalf of themselves and all others similarly situated against Salomon Smith Barney, Inc.; Goldman Sachs & Co.; Merrill Lynch & Co., Inc.; Credit Suisse First Boston Corp.; First Boston, Inc.; Morgan Stanley Dean Witter & Co.; Painwebber, Inc.; Natwest Securities; BT Alex Brown, Inc.; Coburn & Meredith; Shamrock Partners Ltd.; Prudential Securities Inc., Raymond James & Associates, Inc., Donaldson Lufkin & Jenrette; Legg Mason Wood Walker, Inc.; NationsBanc Montgomery Securities LLC; Lazard Freres & Co, LLC; and Morgan Keegan & Co. (collectively "defendants") seeking injunctive and monetary relief for injuries they have purportedly suffered as a result of defendants'

allegedly anticompetitive conduct. Plaintiffs seek to represent all retail brokerage customers who purchased shares of public equity offerings at artificially inflated prices from defendants and their "co-conspirators." Specifically, plaintiffs allege that defendants conspired to restrict plaintiffs' ability to sell their public offering shares in an effort to inflate artificially the stock price for the benefit of institutional investors who were not subject to the purported restrictions.

Now pending is defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for failure to state a claim.[1] For the reasons discussed below, defendants' motion is granted and the complaint is dismissed with prejudice.

BACKGROUND[2]

This case concerns practices involved in syndicated equity underwriting ("syndicated underwriting"). Syndicated underwriting is a common method for distributing public shares of a company. It developed in the late nineteenth century has been practiced ever since. See United States v. Morgan, 118 F. Supp. 621, 635 (S.D.N.Y. 1953) ("the syndicate system as a means of issuing and distributing security issues was in use at least as early as the 1890's") It generally works as follows. A company wishing to issue stock ("Issuer") will hire an investment bank ("Manager") to manage the distribution of shares to the public ("underwriting"). The Manager is responsible for ensuring that the shares are distributed to the public at the fixed-price ("offering price") agreed upon by the Issuer and the Manager. Typically, the offering price is set below the estimated market value of the stock to make the stock more attractive. The Manager, in turn, will approach several other investment banks and brokerage houses

("Syndicate Members") and hire them to distribute some portion of the offered shares to the public. By contract and under Securities and Exchange Commission ("SEC") regulation, all shares sold in a syndicated offering must be sold at the offering price–regardless of the stock's actual market value. In the case of oversubscribed or "hot" public offerings, the Syndicate Members may choose to whom they will sell shares and how many each buyer may purchase. Participation in "hot" offerings is a privilege typically extended to favored customers of the Syndicate Members, a practice popularly known as "friends and families." Syndicate Members may also choose to purchase shares themselves.

"Flipping" is a practice that many consider disruptive to syndicated underwriting. Flipping occurs when persons who purchase shares in initial public offerings ("subscribers") turn around and sell their shares quickly. It is often very appealing for a subscriber to flip because the combination of public offering publicity and the practice of purposely underpricing offerings serves to drive-up the stock price in initial trading. However, if many subscribers flip, their collective action can cause a glut of shares to enter trading, depressing the stock price. The depressed stock price, in turn, can disrupt the efficient distribution of the stock.

Two methods of combating flipping are relevant to the instant case: (1) "Penalty Bids"; (2) Revocation of Public Offering Privileges ("Privilege Revocation"). A Penalty Bid is a contractual arrangement that permits the Manager to reclaim underwriting fees from Syndicate Members when the securities originally sold by the Syndicate Member are re-purchased by the Manager in connection with the distribution. See NASD By-Laws, Schedule D, Part 1(15) (NASD Manual (CCH) P1803). In

essence, Penalty Bids make it unprofitable for Syndicate Members to sell public offering shares to retail customers who flip because the Syndicate Members will have to remit their fees.

Syndicate Members, in turn, sometimes discourage subscribers from flipping through Privilege Revocation. Syndicate Members inform subscribers that if they flip their public offering shares during a specified period following the offering (usually 30-90 days), the subscribers will lose the privilege of being a favored customer in future oversubscribed public offerings. Privilege Revocation does not involve any monetary penalty or legal restriction on the alienability of shares, it simply means that the customer who chose to flip will not enjoy the "friends and family" privilege for some time in the future. Plaintiffs allege that, by agreement among the defendants, Privilege Revocation is only applied to retail customers, not to the "institutional customers" (e.g., investment banks, brokerage houses, mutual funds) who provide defendants business. Complaint, P4. In furtherance of this conspiracy, plaintiffs claim, defendants and their co-conspirators encouraged the Depository Trust Corporation to develop an automated certificate tracking system that would, *inter alia*, allow defendants to track flipping for the purpose of enforcing Penalty Bids and Privilege Revocation. Complaint, P8-10.

Plaintiffs' complaint alleges that defendants have conspired since 1990 to "fix, raise, stabilize and maintain the price of shares of public offerings at levels above free market prices . . ." by instituting and enforcing Privilege Revocation on retail subscribers. Complaint, P3, 11. Plaintiffs assert that this conspiracy is designed to benefit institutional customers by allowing them to flip at "artificially inflated prices" without penalty.

Complaint, P4. Plaintiffs also contend that the purported conspiracy also benefits the Syndicate Members in two other ways: (1) defendants can purchase up to a 15% over-allocation of the offered stock (a "greenshoe") and can sell it into the "artificially inflated" aftermarket for an additional profit, and (2) the "artificially inflated" stock prices created by the conspiracy improve perception of the underwriters' performance which helps defendants compete for future underwriting contracts. Complaint, P11.

Plaintiffs bring this action for injunctive relief and damages pursuant to Fed. R. Civ. P. 23(b) (2) and (b) (3), on behalf of a class comprised of retail brokerage customers (excluding defendants and related persons) who purchased shares of public equity offerings at allegedly inflated prices from defendants during the period of the conspiracy. Complaint, P48. The Complaint asserts that the purported conspiracy violates Section 1 of the Sherman Act, 15 U.S.C. § 1, and defendants' New York common law fiduciary duty to plaintiffs. Although plaintiffs allege that the conspiracy has given rise to a host of improprieties, Complaint, P60-67, the only injury for which they are actually suing is the "inflated" price they paid when they purchased the shares at the offering price. Complaint, P1. Thus, they are specifically suing for the difference in value between (1) the offering price they paid and (2) the value of the shares they purchased subject to Privilege Revocation.

Defendants argue that the Complaint should be dismissed on essentially three grounds. First, defendants argue that the challenged conduct enjoys "implied immunity" from antitrust law. Second, defendants maintain that plaintiffs have failed to plead a horizontal price-fixing scheme–specifically, they have failed to plead adequately a cognizable antitrust injury

or conspiracy. Third, defendants assert that the challenged conduct is properly considered under a "Rule of Reason" analysis, not the "Per Se" analysis pled by the plaintiffs. As a result, the Complaint fails to plead adequately a relevant market definition and marketwide anticompetitive effects.

DISCUSSION

Defendants move to dismiss plaintiffs' claims, pursuant to Fed. R. Civ. P. 12(b) (6), for failure to state a claim upon which relief may be granted. In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), we accept as true all material factual allegations in the complaint, Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992), and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996); see Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In addition to the facts set forth in the complaint, we may also consider documents attached thereto and incorporated by reference therein, Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d. Cir. 1998), as well as matters of public record such as case law and statutes, Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d. Cir. 1998). fs

A. Doctrine of "Implied Immunity"

The Supreme Court has long held that "antitrust laws do not come into play when they would prohibit an action that a regulatory scheme permits." Finnegan v. Campeau Corp., 915 F.2d 824, 827 (2d Cir. 1990) (citing United States v. National Ass'n of Sec. Dealers Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975) ("NASD");

Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975); and Silver v. New York Stock Exch., 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)); see generally Finnegan, 915 F.2d at 828-29 (Second Circuit overview of the Silver, Gordon, NASD trilogy of cases in which the Supreme Court outlined the doctrine of implied immunity). This "implied immunity" is found based on: (1) the presumption that Congress does not intend antitrust laws to conflict with regulatory provisions it enacts, see e.g., Finnegan, 915 F.2d at 826 ("Congress was not so muddled that it gave away with the right hand of securities regulation that which it then took away with the left hand of antitrust law..."); Northeastern Telephone Co. v. American Tel. & Tel. Co., 651 F.2d 76, 82 (1981), and (2) that failure to honor this implied immunity would subject actors to conflicting standards. See, e.g., Gordon, 422 U.S. at 689 (finding immunity because "to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards."); Strobl v. New York Mercantile Exch., 768 F.2d 22, 27 (2d. Cir. 1985) ("Without antitrust immunity the exchanges would be subject tes arying standards or requirements issued by various federal courts and thereby be unable to function in a consistent manner, without violating either the mandate of an antitrust decision of the Rules of the SEC.")

As a general matter, "implied antitrust immunity is not favored, and can be justified only by a convincing showing of a clear repugnancy between the antitrust laws and the regulatory system." Gordon, 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598; see National Gerimedical Hosp. & Gerontology v. Blue Cross, 452 U.S. 378, 388, 69 L. Ed. 2d 89, 101 S. Ct. 2415 (1981); NASD, 422 U.S. at 719-720; United States v Philadelphia National Bank, 374

U.S. 321, 350-351, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963). And where it is inferred, "repeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." Silver, 373 U.S. at 357. However, "to be sure," the Supreme Court has held, "where Congress did intend to repeal the antitrust laws, that intent governs..." National Gerimedical, 452 U.S. at 389.

There are two situations in which implied immunity of the Sherman Act is inferred: "first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, [citing Gordon, 422 U.S. at 685-86, 688-89], and second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition. [citing NASD, 422 U.S. at 730; Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)]." Northeastern Telephone Co. v ATT, 651 F.2d 76, 82 (2d Cir. 1981). It is with the first ground for implied immunity that we concern ourselves in this case.

"Whenever claims of implied immunity are raised, they must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it." Northeastern Telephone Co. v ATT, 651 F.2d at 83; see NASD, 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (basing implied immunity decision on detailed analysis of the legislative and administrative history of the statutory provision in question); Gordon, 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (same); Silver, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (same); Finnegan, 915 F.2d 824 (same); Strobl, 768 F.2d 22 (same).

Examining the Supreme Court's and Second Circuit's

analyses of implied immunity cases, several factors emerge as particularly important for establishing implied immunity: (1) statutory language empowering the overseeing administrative agency to regulate the conduct;[3] (2) evidence of Congress' awareness of the conduct at the time it enacted the regulating legislation; (3) evidence that the administering agency paid attention to the challenged conduct in considering regulation since the legislation's enactment and, in particular, considered the competitive implications of such regulation; n4 and (4) a reasonable explanation of why allowing antitrust action here would subject actors to conflicting standards.[5]

Two other aspects of the implied immunity doctrine are material to the instant case. First, the Supreme Court has held that implied immunity may be found not only where an administrative agency has acted, but where it has studied a situation and consciously chosen to refrain from acting. See NASD, 422 U.S. at 728 (finding that "[the] [Securities Exchange] Commission's acceptance of fund-initiated restrictions for more than three decades hardly represents abdication of its regulatory responsibilities... it manifests an informed administrative judgment that contractual restrictions were inappropriate..." and constituted sufficient involvement to justify implied immunity); see also, Finnegan, 915 F.2d 824 ("That the SEC has chosen not to prohibit [the challenged conduct] as fraudulent or manipulative practices... does not reduce the SEC's supervisory authority over [the challenged conduct]. Consequently, because the SEC has the power to regulate... and has implicitly authorized [the challenged conduct]... to permit an antitrust suit to lie against [the challenged conduct] would conflict with the proper function of the securities laws.").

Second, in deciding what constitutes the "repugnance" necessary for implied immunity, courts have drawn an important distinction between the overlap and conflict of antitrust and regulatory laws. A mere overlap of the two is insufficient for repugnancy. In Strobl, 768 F.2d 22, the Second Circuit faced a situation where defendants were sued for conduct that violated both the Commodities Exchange Act ("CEA"), 7 U.S.C.A. § 1 et. seq., and the Sherman Act. Defendants argued that the CEA specifically outlawed the conduct and, therefore, it enjoyed implied immunity from the Sherman Act's treble damages provision. The Second Circuit rejected defendants' argument, ruling that "price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws... [and] therefore, application of the latter cannot be said to be repugnant to the purposes of the former." Id. at 28. Thus, a defendant must demonstrate the potential that actors will be subject to conflicting standards, not just overlapping standards, in order to establish that its conduct deserves implied immunity.

B. The Application of Implied Immunity Under Section 9(a)(6)

Defendants argue that the SEC's regulation of syndicated offering practices under 15 U.S.C. 78(i)(a)(6) ("Section 9(a)(6)") enjoys implied immunity from the antitrust laws. Section 9(a)(6) provides that:

"It shall be unlawful for any person, directly or indirectly...

(6) To effect either alone or with one or more persons any series of transactions for the purchase and/or sale of any security registered in a national securities exchange

for the purpose of pegging, fixing or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors." [emphasis added]

In order to evaluate whether Section 9(a)(6) and the SEC's action under it confer implied immunity on defendants' conduct, we must consider the provision's legislative and administrative history in some detail.

1. Pre-SEC History

Price stabilization to combat flipping has been a feature of syndicated underwriting since the late Nineteenth Century. In United States v. Morgan, 118 F. Supp. 621, 635 (S.D.N.Y. 1953), this Court rejected a United States Department of Justice ("DOJ") antitrust suit against seventeen prominent investment banking firms which alleged that the firms "invented" syndicated underwriting in an effort to exclude competition. Central to the alleged conspiracy were practices designed "to stabilize the business 'by fixing and controlling the prices, terms, and conditions of purchase, sale and resale of securities." Id. at 630. Judge Medina's 211-page opinion, built on a three-year trial record, examined the modern history of syndicated underwriting in great detail. It found that the transition in the early part of this century from the former purchase and banking group underwriting system to syndicated underwriting was a response, in part, to the risk, "appreciated even in those days," that "placing upon the market a large bulk of new securities" could "depress the price and make distribution within a reasonable time difficult if not impossible." Id. at 635-36, 643. Specifically, Morgan found that since early this century, syndicates had employed stabilizing practices

such as Penalty Bids to counter the effects of flipping and to maintain the offering price. n6 In order to track flipping and enforce penalty bids, "records of the serial numbers of securities were kept, and the securities which appeared in the market were thus traced to the dealers who sold them."[7] Id. Contemporaries considered these stabilization practices to be business necessity, not a predatory tactic.[8] Thus, it is clear that stabilization practices such as Penalty Bids were widely utilized to counteract the effects of flipping prior to the creation of the SEC and federal securities laws. They evolved along with the practice of syndicated underwriting, not as a later exploitation of that system.

2. SEC Creation

In response to manipulative securities practices that contributed to the stock market crash of 1929, Congress conducted a lengthy investigation into securities trading. The investigation produced the anti-manipulation provisions of the Securities Exchange Act of 1934 ("1934 Act"). 15 U.S.C. §§ 78a et seq. In drafting the 1934 Act, Congress enjoyed "a complete and comprehensive understanding... of [then] current methods of operation in common use in the securities issue business," Morgan, 118 F. Supp. at 646, including common price-manipulation practices. In fact, Congress chose to outlaw outright a number of price-manipulation practices.[9] See S Rep. No. 792, 73d Cong., 2d Sess. 7-8 (1934)("1934 Act Senate Report").

However, Congress specifically excepted from its ban manipulation to achieve price stabilization in syndicated public offerings. Instead, it empowered the SEC to regulate these practices. The 1934 Act Senate Report explained:

"The impropriety of practices such as 'pegging,' or fixing or stabilizing the price of a security received most careful consideration by the committee. The committee recommends that such practices not be abolished by statute but subjected to regulation by the Commission." 1934 Act Senate Report at 8-9 (emphasis added).

See also Morgan, 118 F. Supp. at 695 ("Congress decided not to prohibit such [stabilization] activities, or to include any specific statutory regulations thereof, but left it to the SEC to prescribe appropriate rules and regulations"); In re Nat'l Ass'n. of Securities Dealers, Inc., 19 S.E.C. 424, 460 (1945)("In re NASD") ("Congress, in enacting Section 9(a)(6) of the Securities Exchange Act of 1934, decided against the outright prohibition of stabilization... and delegated to this Commission the authority to make rules and regulations defining the permissible limits of stabilization."). Section 9(a)(6) of the 1934 Act codified Congress' delegation of regulatory authority over "pegging, fixing or stabilizing" securities prices in conjunction with public offerings.[10]

3. 1939 Regulations

In 1939, the SEC promulgated its first rules pursuant to Section 9(a)(6) regulating price-stabilizing activities. The rules permitted existing practices to continue subject to duties of: (1) notice, to be given in the offering prospectus if the underwriters intended to engage in price stabilization during the distribution, see 17 C.F.R. § 240.17a-2, and (2) disclosure, in the form of reports of stabilizing activity. See 17 C.F.R. 230.426 ("Rule 426").

4. 1940 Statement

In 1940, the SEC issued its first policy statement on "The Regulation of 'Pegging Fixing and Stabilizing' of Securities Prices." SEC Release No. 34-2446 (March 18, 1940)("1940 Statement"). In the 1940 Statement, the SEC began a pattern of analysis and action that characterized its approach to regulating price stabilization over the next 60 years. First, the SEC observed that stabilizing is inherently anti-competitive, but is considered important to combat flipping and to facilitate efficient distribution of shares to the public. Next, it recognized that it had a statutory duty to weigh competitive concerns and investor protection in acting under Section 9(a)(6). Finally, having weighed competitive concerns and investor protection, the SEC chose to allow the practice to continue, subject to regulation.

The SEC began the 1940 Statement by acknowledging that stabilizing is a form of market manipulation and that elements of it are undesirable. It declared, "the Commission is unanimous in recognizing that stabilizing is a form of manipulation. The statute itself so recognizes. The Commission also agrees that stabilizing in many respects is undesirable." Id. at 2; see id. at 5-6 ("stabilizing represents a form of manipulation which interferes with free and open markets.").

However, despite these misgivings about the anti-competitive nature of manipulation, the SEC recognized that "stabilization. . . is now an integral part of the American system of fixed-price security distribution." Id. at 9. The 1940 Statement specifically noted that one of the primary justifications given for stabilization was combating flipping. It first observed that flipping was a problem: "Selling pressure result[s] from the fact that some purchasers change their minds and almost immediately resell [shares of public offerings]. In part, this selling comes from so-called 'free-riders' or

speculators who purchase in the hope of quickly selling out and taking a profit on an early rise." Id. at 5. Stabilization was offered as a means for combating the market disruption caused by flipping. Id. at 7-8 ("Stabilization is warranted in order to offset the market 'abnormalities' which result from. . . 'free riders, ' as well as other buyers who change their minds, [and] sell. . . at a time when there is a temporary imbalance between supply and demand created by the offering. . . exerting a market influence which, according to the underwriters, is all out of proportion to their real significance."). Although the SEC was uncomfortable with the anti-competitive nature of stabilizing, it recognized the its justifications and importance to the capital markets.

The SEC next explicitly acknowledged that it had a statutory duty to take account of these competitive concerns in regulating under Section 9(a)(6). The 1940 Statement explained: "The Securities Exchange Act, while primarily directed towards the protection of investors, is also concerned with the protection of the nation's credit and banking structures and the health of the capital markets. . . Therefore, by section 9(a)(6) of the Securities Exchange Act, it is assigned to this Commission the duty of finding a reasonable middle ground between the two objectives. . ." Id. at 10 (emphasis added). In regulating under the Section 9(a)(6), the SEC strove to meet this statutory obligation.[11]

Having weighed the competitive concerns, the SEC chose to allow stabilizing to continue under regulation. In doing so, it rejected the petitions of many who sought to have the practice outlawed altogether, finding that abolition would violate Congress' intent.

"In the first place, Congress did not abolish stabilizing. It authorized this Commission, by regulation, to eliminate only the 'vicious and unsocial aspects of those practices.' It will not do for this Commission to proceed on the basis of a viewpoint which Congress, in its wisdom, did not find acceptable."

1940 Statement at 12. The SEC undertook a "piecemeal" approach to regulation, enacting several regulations and leaving the door open to further action in the future. See 1940 Statement at 14.

The 1940 Statement strongly suggests that the SEC believed its authority to regulate stabilizing under the 1934 Act enjoyed immunity from antitrust regulation. Clearly, the 1940 Statement demonstrates that the SEC understood its power to be broad and exclusive in regulating stabilizing under the 1934 Act.

"Under the Securities Exchange Act as it now stands, many forms of stabilizing, no matter how vicious, are lawful except to the extent that they may violate rules of the Commission or other provisions of law. . . In the absence of regulation, stabilizing may be lawfully employed under many other circumstances where it is both ethically and economically indefensible."

1940 Statement at 12-14 (emphasis added). Givenat 1t the SEC had already acknowledged that stabilizing was inherently manipulative and anti-competitive, the "vicious" and "ethically and economically indefensible" conduct to which it referred would otherwise have run afoul of antitrust law. [12] Yet, the SEC clearly stated that these anticompetitive actions would be lawful in the absence of SEC regulation. Furthermore, the SEC

appears to have recognized that stabilizing could cause antitrust harm to investors:

"There is no denying the fact that to allow any stabilizing, in order to achieve the Congressional objective of not seriously interfering with the needs of industry for capital, may to some extent block the other Congressional objective of protecting the individual, direct investors who buy securities."

1940 Statement at 13. Nevertheless, it is evident that the SEC believed that the power to remedy anti-competitive injury from stabilizing lay exclusively in its hands and that the regulations it enacted took account of this risk.

"The possibilities of injury to such buyers, resulting from stabilizing, can be reduced - although perhaps they cannot be wholly eliminated - by careful regulation of stabilizing. To that limited extent the one objective of Congress [facilitating capital markets] must give way to the other [investor protection]."

Id. Finally, the SEC made clear that if anticompetitive injuries to investors grew too serious, the proper remedy was further rulemaking after congressional consultation, not antitrust relief.

And if, after a period of working with regulated stabilizing, we find that the injury to purchasing investors is uncontrollably too great, then, *but not before*, we should request Congress to determine which of these two objectives [capital markets efficiency and investor protection] is to be present."

Id. Thus, the 1940 Statement gives compelling evidence that even at the beginning of the SEC's involvement in regulating stabilizing, it believed its regulatory authority

over stabilization practices was exclusive.

5. SEC Action 1940-1990

Over the next half century, the SEC returned several times to the issue of regulating stabilization practices and consistently upheld the approach it laid-out in its 1940 Statement. In In re NASD, 19 S.E.C. 424 (1945), the SEC vacated an NASD disciplinary ruling concerning underwriters and dealers who sold bonds below offering prices. In the course of its ruling, the SEC reaffirmed its belief "that Congress intended this Commission to consider all aspects of stabilization problems," id. at 461, and explained its views on "price-maintenance" provisions including Penalty Bids. Id. at 428. It noted that these provisions "were in use prior to the creation of this Commission and long before the registration of the NASD. . . [and concluded that] our views with respect to such provisions are very much the same as our views on the 'pegging, fixing and stabilizing of securities prices . . . i.e., that we should not prohibit such provisions." Id. at 443-44. In 1955, the SEC adopted the "Trading Practice Rules" which codified its positions "in considering questions relating to manipulative activity and stabilization in connection with an offering." SEC Release No. 34-5040 (May 18, 1954). 17 CFR § 240.10b-7 ("Rule 10b-7"), applied specific restrictions on what types of stabilization could be used and at what prices,[13] but otherwise allowed the practice to continue. SEC Release No. 34-5194 (July 5, 1955).

Between 1961 and 1963, the SEC undertook a massive audit of all stock exchange and securities association rules and submitted a "monumental" five-volume report in which it made suggestions "to strengthen the mechanisms facilitating the free flow of capital into markets and to strengthen investor protections." H.R.

Rep. No. 1418, 88th Cong., 2d Sess., 1964 U.S.C.C.A.N. 3013, 3017 (May 19, 1964). The report directly addressed the incidence of "free riders" in oversubscribed public offerings and observed that underwriters "attempted to place stock where long-term investment was likely," rather than to investors likely to "sell their allotments in the immediate aftermarket." H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 523, 526 (1963). The SEC recognized that underwriters sought to combat flipping through practices including Revocation of Privilege, the very conduct challenged in the instant suit.

"Some firms place restrictions not upon the salesman but upon the customer. Firms 'flagged' or identified customers who sold stock in the immediate after-market by reviewing the transfer sheets; those who sold were unlikely to receive allotments of subsequent oversubscribed issues . . . Some customers stated that they were told not to sell for varying periods, usually 30 to 60 days."

Id. at 525-26 (emphasis added). Yet despite considerable attention paid in the report to stabilizing practices such as Penalty Bids and Revocation of Privilege, not one of its 175 recommendations identified them as problematic. In sum, during the 50-plus years following the 1940 Statement, the SEC actively examined and considered the propriety of stabilizing practices such as Penalty Bids and Privilege Revocation, and chose to allow them to continue subject to regulation.

6. Regulation M and Automated Certificate Tracking System

During the past decade, the SEC reconsidered its entire regulation of stabilizing practices under Section 9(a)(6). Once again, it chose to permit the practices subject to

new, more flexible, regulation. In 1994, the SEC announced that it was undertaking a "comprehensive review" of the Trading Practice Rules "in light of significant changes in the securities markets and distribution practices in recent years." SEC Release No. 33-7075, 34-33924, 56 S.E.C. Docket 1302 (April 19, 1994). In its announcement, the SEC focused on the increase in flipping n14 and the shift in stabilizing practices to the "aftermarket" period following distribution of shares in a public offering.[15] It solicited comments on the implications of both phenomena.

In 1996, based on responses to its 1994 solicitation and intensive study, the SEC proposed and adopted Regulation M which reaffirmed the legality of Penalty Bids and other stabilizing activities. See SEC Release Nos. 33-7282, 34-37094, 61 S.E.C. Docket 1713 (April 11, 1996) ("Proposing Release"); SEC Release Nos. 33-7375, 34-38067, 63 S.E.C. Docket 1141 (December 20, 1996) ("Adopting Release"). Regulation M replaced the old Trading Practice Rules with "a more flexible framework for stabilizing transactions." n16 Adopting Release at 1141. In choosing this approach, the SEC recognized that "one of the objectives of a penalty bid is to encourage syndicate participants to sell the securities to those persons who intend to hold them rather than engage in short-term profit-taking, *i.e.*, to combat flipping." Proposing Release at 1740; see also id. at 1739 ("underwriters . . . have an incentive to provide 'support' in the aftermarket to counterbalance pressure on the security's price from 'flipping' and other selling activity that could adversely affect the investors who have purchased the offering"). Regulation M accepted the utility of stabilizing in combating flipping and created flexible regulations to facilitate its implementation, while guarding against abuse.

Finally, in 1996, the SEC adopted a proposal to create an

automated certificate tracking system ("automated tracking system") for the purpose, *inter alia*, of combating flipping through stabilization practices. The proposal was the result of a 1992 SEC blue-ribbon task force report on reducing dependence on physical securities certificates in order to accelerate trading settlement. See Report of the Bachmann Task Force on Clearance and Settlement Reform in the U.S. Securities Markets (May 1992) ("Bachmann Report"). The task force found that tracking trades in order to combat flipping was a central function of the settlement system[17] and that "the ability to monitor this practice [flipping] should not be lost in a certificateless environment." See Letter from John W. Bachmann to Hon. Richard C. Breeden dated May 26, 1992, accompanying Bachmann Report at 5. In response to the Bachmann Report, the SEC adopted ten rule changes to facilitate adoption of a "flipping tracking system."[18] In May 1996, the SEC adopted the Depository Trust Corporation's proposal for an automated tracking system and recognized approvingly that the system would help Managers combat flipping. See SEC Release No. 34-37208, 61 S.E.C. Docket 2365, n.7 (May 13, 1996).

7. Summary

In sum, when we apply the requirements for implied immunity discussed earlier, it is clear that the conduct plaintiffs challenge is immune from the antitrust laws. Section 9(a)(6)'s legislative and administrative history establishes that defendants' conduct is a species of the "pegging, fixing or stabilizing" of securities over which the SEC has exclusive jurisdiction. The SEC's sanction of the conduct is "clearly repugnant" to the application of the antitrust laws as alleged in plaintiffs' complaint. Thus, it is entitled to immunity.

Congress was well aware of stabilization practices at the time it created the SEC and Section 9(a)(6). These practices "received most careful consideration" by the Senate Committee on Banking and Currency when it was drafting the 1934 Act. However, unlike insidious manipulation practices that it outlawed outright, Congress sanctioned stabilizing practices and delegated to the SEC regulatory authority over them in Section 9(a)(6). As the 1940 Statement noted, Congress' decision to delegate regulatory authority over stabilization practices to the SEC is a strong indication that it found these practices to be lawful, despite their manipulative nature. Furthermore, in light of Congress' perennial interest in the efficient function of the capital markets, it is noteworthy that Congress has not chosen to intervene during the sixty six years in which the SEC has permitted the challenged conduct.

The SEC has actively studied and regulated stabilization practices over the past 60 years. Through the 1939 Rules, the 1940 Statement, the 1945 In Re NASD decision, the 1955 "Trading Practice Rules," the 1961-1963 audit, the 1994-1996 Regulation M proceedings, and the 1996 decision to support an automated tracking system, the SEC has kept a vigilant eye over stabilization practices and has adjusted its regulation to facilitate stabilization while guarding against its abuse. Consistent through all of these actions has been the SEC's studied assessment that the benefits of price stabilization to the capital markets outweigh the admitted anti-competitive aspects of stabilizing manipulation. To any extent that the SEC's regulations did not explicitly authorize the precise practices alleged by plaintiffs, its conscious decision not to prohibit this activity over which it had explicit authority "implicitly authorized" the conduct and, therefore, "to permit an

antitrust suit to lie against [the conduct] would conflict with the proper functioning of the securities laws." Finnegan, 915 F.2d at 831; see NASD, 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486.

The potential conflict between plaintiffs' reading of the antitrust laws and the SEC's regulation of stabilizing under 9(a)(6) could not be clearer. The SEC has held that the challenged conduct is permissible under Section 9(a)(6) while plaintiffs claim that antitrust laws forbid it. An actor seeking to engage in the stabilization practices challenged in this suit would plainly be subjected to conflicting standards.

Plaintiffs respond that even if 9(a)(6) does give implied immunity to "pegging, fixing or stabilizing," the practice of Privilege Revocation challenged in this suit is different from the stabilization practices sanctioned by the SEC and, thus, is not immune to antitrust law. This argument is flawed for two reasons. First, plaintiffs seem to ignore clear examples of the SEC's awareness of Privilege Revocation, see, e.g., supra discussion of 1961-1963 SEC audit. Second, and more important, whether or not Privilege Revocation is an appropriate "pegging, fixing or stabilizing" practice is not a question for this Court. Although we might have jurisdiction to impose antitrust penalties on defendants for practicing Privilege Revocation if the SEC had declared the practice unlawful, see Strobl, 768 F.2d 22 (holding that antitrust penalties may apply to conduct outlawed by the SEC because does not present a conflict between SEC regulation and antitrust law), it remains within the SEC's exclusive jurisdiction to declare whether Privilege Revocation is unlawful. The SEC has not done so. Indeed, by every indication it has sanctioned this conduct subject to regulation.[19]

For the reasons discussed above, we find that defendants' challenged conduct is immune from the application of antitrust laws because the SEC has exclusive authority to regulate it under Section 9(a)(6). Because this conclusion disposes of plaintiff's federal claim, we do not reach defendants' other defenses.[20] Accordingly, the First Count of plaintiffs' amended complaint is dismissed with prejudice.[21]

D. Breach of Fiduciary Duty

We have dismissed plaintiffs' federal antitrust claim which was the sole predicate for federal jurisdiction. When federal claims are dismissed, retention of state law claims under supplemental jurisdiction is left to the discretion of the trial court. See 28 U.S.C. § 1367(c)(3)(1994) ("district courts may decline to exercise supplemental jurisdiction over a claim. . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction."); Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir.1994); In re Merrill Lynch Ltd. Partnerships Litig., 7 F. Supp. 2d 256, 258 (S.D.N.Y. 1997). We decline to exercise supplemental jurisdiction over plaintiff's New York state law claim for breach of fiduciary duty. Accordingly, the Second Count of plaintiffs' amended complaint is dismissed with prejudice.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) is granted and plaintiffs' claims are hereby dismissed with prejudice.

IT IS SO ORDERED.

DATED: New York, New York

December 7, 2000

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

----------Footnotes----------

n1 Plaintiffs filed this claim on August 21, 1998. It was transferred to our docket on October 18, 2000.

n2 Unless otherwise indicated, all facts and allegations concerning this case are taken from the Parties' Statements of Material Facts Pursuant to Local Civil Rule 56.1 and the Parties' respective pleadings and answers.

n3 The Supreme Court has made it plain that "intent to repeal antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge. National Gerimedical, 452 U.S. at 389 (citing NASD, 422 U.S. at 730-734; Gordon, 422 U.S. at 689-690).

n4 The Supreme Court has been reluctant to find implied immunity where the regulatory agency sanctioned or required a challenged practice without taking into account the competitive concerns embodied in antitrust laws. See National Gerimedical, 452 U.S. at 390 ("antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity"); United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959).

n5 See, e.g., Gordon, 422 U.S. at 689; Finnegan, 915 F.2d at 828 ("The holdings in Silver and Gordon teach that antitrust laws do not come into play when they would prohibit an action that a regulatory scheme permits.") Strobl, 768 F.2d at 27.

n6 "Through such stabilizing operations, the manager sought to prevent any securities which had been sold by dealers, from coming back into the market in such a manner as to depress the public offering price. It was felt that with respect to the securities which appeared in the market, the members of the selling syndicate had not performed their function of 'placing' with investors, for which they were paid a selling commission; and, consequently, 'repurchase penalties' were provided for, whereby the manager had the right to cancel the selling commission on the sale of those securities which he purchased in the market at or below the public offering price. Under most agreements, the manager had the option of either cancelling the selling commission on the sale of the securities, or of requiring the member who sold the securities to take them up at their cost to the trading account... Stabilizing operations and the repurchase penalty were used in all of the three types of selling syndicates which prevailed throughout this period." Id. at 643.

n7 The fact that this practice has been ongoing for nearly a century and predated the formation of the SEC tends to undermine plaintiffs' suggestion that the advent of the Automated Tracking System and "Penalty Bid Tracker" in the late 1990's was evidence of new unlawful practices by defendants.

n8 Morgan cited the testimony of one industry witness, Harold L. Stuart, who testified that "'you simply had to have such a clause in order to make this business

function in putting the securities on the market,' because 'there were many ways that shrewd people could beat the game and spoil the putting of any security issue on the market unless you did this.'" Morgan, 118 F. Supp. at 643.

n9 The 1934 Act Senate Committee report stated: "Several devices are employed for the purpose of artificially raising or depressing security prices. Those which appear to serve no legitimate function are specifically prohibited. Among such practices are fictitious 'wash' sales; 'matched' orders, or orders for the purchase and sale of the same security emanating from a common source for the purpose of recording operations on the tape and thereby creating a false appearance of activity; and other transactions specifically designed to manipulate the price of a security." 1934 Act Senate Report at 7-8.

n10 See 1934 Act Senate Report at 17 ("The "pegging" of securities prices is left to regulation by the Commission under paragraph (6) [of Section 9(a)] as it may deem necessary for the prevention of activities detrimental to the interests of investors."); H.R. Rep. No. 1383, 73d Cong., 2d Sess, 10, 21 (1934)(The 1934 Act delegates to the SEC the authority to prescribe "such regulation... as [the SEC] may deem necessary for the prevention of activities detrimental to the interests of investors").

n11 "In determining whether the solution to the problem lies in prohibiting stabilizing, in subjecting it to regulation or in continued nonaction, the Commission has sought to weigh the relative advantages and disadvantages to the investor and to the national economy which may attend each of these alternatives." Id. at 6.

n12 Indeed, the Supreme Court ruled later that year that "under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).

n13 "Rule 10b-7 prohibits certain specific activities, including bids or purchases not necessary for the purpose of preventing or retarding the decline in the open market of the price of a security, and stabilizing at a price resulting from illegal activity. The rule establishes the price level at which a stabilizing bid may be entered, and rules of priority for the execution of independent bids at times when a stabilizing bids [sic] has been entered. In addition, the rule regulates the number of stabilizing bids that an underwriting syndicate may enter in any one market at any one time, and the entry of stabilizing bids on markets other than the principal market for the security being stabilized. The rule also requires that notice be given that the market will be or is being stabilized, and requires a person effecting stabilizing transactions to keep the information and make the notification required by Rule 17a-2 under the Exchange Act." SEC Release No. 33-7075, 34-33924, 56 S.E.C. Docket 1302 (April 19, 1994).

n14 The SEC noted that, "immediate aftermarket selling by substantial purchasers in the offering, known as 'flipping' had become common," and recognized that it "appeared to be a longstanding phenomenon." Id. at n.92.

n15 "The 'aftermarket' of the offered security [is] the period following cessation of the sales efforts in the offering. . . 'Stabilization' of the market in connection

with offerings may have shifted from the sales period to the aftermarket period." Id. at 1316.

n16 The SEC explained: "Regulation M significantly eases regulatory burdens on offering participants by eliminating the trading restrictions for underwriters of actively-traded securities; reducing the scope of coverage for other securities; reducing restrictions on issuer plans; providing a more flexible framework for stabilizing transactions; and deregulating rights offerings." Adoption Release at 1141 (emphasis added).

n17 The Bachmann Report stated that: "One obstacle to achieving depository eligibility for new issues is the current use of physical certificates to track potential inappropriate trading of [public offerings] back to the syndicate during the stabilization period. This inappropriate trading, commonly known in the industry as 'flipping', occurs during the new issue stabilization period. . . Syndicate managers rely on the certificate number to identify which member of the syndicate sold the issue to the investor who 'flipped' it back to the syndicate so that they can recoup a portion of the seller's concession paid to that syndicate member." Bachmann Report at 28 (emphasis added).

n18 SEC Release No. 34-36778, 61 S.E.C. Docket 465 (Jan. 26, 1996); SEC Release No. 34-36568, 60 S.E.C. 2312 Docket (Dec. 8, 1995); SEC Release No. 34-35798, 59 S.E.C. Docket 986 (June 1, 1995); SEC Release No. 34-35772, 59 S.E.C. Docket 935 (May 26, 1995); SEC Release No. 34-35773, 59 S.E.C. Docket 936 (May 25, 1995); SEC Release No. 34-35774, 59 S.E.C. Docket 938 (May 26, 1995); SEC Release No. 34-35740, 59 S.E.C. Docket 853 (May 19, 1995); SEC Release No. 34-35734, 59 S.E.C. Docket 779 (May 18, 1995); SEC Release No. 34-35735, 59 S.E.C. Docket 781 (May 18, 1995); SEC Release No.

34-35711, 59 S.E.C. Docket 725 (May 12, 1995).

n19 The SEC continues to regulate actively in this area. Just this week, the Wall Street Journal reported that the SEC had prohibited certain "quid pro quo" aftermarket stabilizing practices on the grounds that they could "violate longstanding antifraud and antimanipulation provisions of federal securities law." See, e.g., Susan Pullman and Randall Smith, "Seeking IPO Shares, Investors Offer to Buy More in After-Market, And Pledges Can Be a Factor, Underwriters Say, Though They Deny Quid Pro Quo - Trying to Avoid the Flippers", Wall St. J., Dec. 6, 2000, at A1. However, the SEC chose not to prohibit the practices challenged in this suit, providing further evidence of its continued sanction.

n20 We note, however, that plaintiffs' alleged antitrust injury is dubious. Plaintiffs claim that they were injured because they overpaid for the offering shares. This Court cannot find an injury because it sees no overpayment–plaintiffs bought their shares at the same price as the institutional investors and were free to sell them in the aftermarket without legal restriction. This claim is rendered even less compelling because plaintiffs, unlike the public at large, purchased the shares at the offering price, a price generally set below the shares' estimated market value.

n21 Plaintiffs have been given ample opportunity to cure their pleadings. After defendants moved to dismiss in November 1998, plaintiffs amended their complaint. In amending their complaint, plaintiffs had the benefit of analyzing defendants' memorandum of law supporting the first motion to dismiss. Plaintiffs' amended complaint still failed to state a claim on which relief could be granted and we see no way in which they can

cure their claim through re-pleading.

Docket No. 01-7207

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL and SYBIL MEISEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

SALOMON/SMITH BARNEY, INC., GOLDMAN SACHS, MERRILL LYNCH & CO., INC., CREDIT SUISSE FIRST BOSTON, CORP., MORGAN STANLEY DEAN WITTER, PAINEWEBBER INC., NATWEST SECURITIES, DEUTSCHE BANK ALEX BROWN, INC., COBURN & MEREDITH, INC., SHAMROCK PARTNERS LTD., PRUDENTIAL SECURITIES INC., RAYMOND JAMES & ASSOCIATES, INC., DONALDSON LUFKIN & JENRETTE, LEGG MASON WOOD WALKER, INC., NATIONS BANC MONTGOMERY SECURITIES, LLC, LAZARD FRERES & CO., LLC, and MORGAN KEEGAN & CO.,

Defendants-Appellees.

3/11/03

Denied.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

CODE OF FEDERAL REGULATIONS
TITLE 17--COMMODITY AND SECURITIES EXCHANGES
CHAPTER II--SECURITIES AND EXCHANGE COMMISSION
PART 242--REGULATIONS M, ATS, AND AC AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES
REGULATION M

§ 242.104 Stabilizing and other activities in connection with an offering.

(a) Unlawful Activity. It shall be unlawful for any person, directly or indirectly, to stabilize, to effect any syndicate covering transaction, or to impose a penalty bid, in connection with an offering of any security, in contravention of the provisions of this section. No stabilizing shall be effected at a price that the person stabilizing knows or has reason to know is in contravention of this section, or is the result of activity that is fraudulent, manipulative, or deceptive under the securities laws, or any rule or regulation thereunder.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

§ 78i. Manipulation of security prices

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member

of a national securities exchange–

(a) Transactions relating to purchase or sale of security

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

§ 78w. Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that

any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

§ 78c. Definitions and application

(f) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

No. 02-1808

IN THE

Supreme Court of the United States

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL, and SYBIL MEISEL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SALOMON SMITH BARNEY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the court of appeals correctly hold that Petitioners' antitrust claim was barred under the doctrine of implied immunity in light of the express grant to the SEC in section 9(a)(6) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(6) (the "Exchange Act"), of power to regulate the challenged conduct and the subsequent exercise by the SEC of its informed administrative judgment over the years not to prohibit such conduct?

RULE 29.6 STATEMENT

Respondent Coburn & Meredith has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.) is a wholly owned subsidiary of Citigroup, Inc.

Respondent Credit Suisse First Boston LLC, as successor by merger to Credit Suisse First Boston Corporation ("CSFB"), is a wholly-owned subsidiary of Credit Suisse First Boston (USA), Inc., a public reporting company which has certain publicly-traded securities and which is a wholly-owned subsidiary of Credit Suisse First Boston, Inc. Credit Suisse First Boston, Inc. is a jointly owned subsidiary of Credit Suisse Group, whose shares are publicly traded on the Swiss Stock Exchange, and Credit Suisse First Boston, which itself is a wholly-owned subsidiary of Credit Suisse Group. Except as described above, CSFB has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of CSFB.

Respondent Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown) is a wholly owned subsidiary of Deutsche Bank AG.

Respondent Donaldson, Lufkin & Jenrette, Inc. is a wholly owned subsidiary of Credit Suisse Group.

Respondent Goldman, Sachs & Co. certifies that as of August 15, 2003, the following parent corporations or publicly held corporations own more than 10% of its stock: The Goldman Sachs Group, Inc.

Respondent Lazard Freres & Co. LLC is a wholly owned subsidiary of Lazard LLC and Eurazeo.

Respondent Legg Mason Wood Walker, Inc. is a wholly-owned subsidiary of Legg Mason, Inc.

Respondent Merrill Lynch & Co., Inc. has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent Morgan Keegan & Company, Inc. is a wholly-owned subsidiary of Morgan Keegan, Inc.

Respondent Morgan Stanley (f/k/a Morgan Stanley Dean Witter & Co.) has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent NationsBanc Montgomery Securities LLC is a predecessor in interest to Banc of America Securities LLC. NationsBanc Montgomery Holdings Corporation is the parent of Banc of America Securities LLC. It owns 99.9% of the stock of Banc of America Securities LLC. The remaining .1% of the stock of Banc of America Securities LLC is owned by NB Holdings Corporation. There are no publicly held companies that own 10% or more of the stock of Banc of America Securities LLC. However, Bank of America Corporation, which is a publicly held company, owns 100% of the stock of NB Holdings Corporation, which in turn owns 100% of NationsBanc Montgomery Holdings Corporation.

Respondent NatWest Securities is a wholly owned subsidiary of the Royal Bank of Scotland Group.

Respondent Prudential Securities Incorporated is a wholly owned subsidiary of The Prudential Securities Insurance Company of America, Prudential Securities Group, Inc. and Prudential Financial, Inc.

Respondent Raymond James & Associates, Inc. is a wholly-owned subsidiary of Raymond James Financial, Inc.

Respondent Shamrock Partners, Ltd. has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent UBS Financial Services Inc. (f/k/a UBS PaineWebber Inc., f/ka/ PaineWebber, Inc.), is an indirect wholly-owned subsidiary of UBS AG, a publicly-traded company.

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SEC Release Nos. 33-7375, 34-38067, 63 S.E.C. Docket 1141, 1170 (Dec. 20, 1996) 19, 20

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of all Respondents.[1] In the proceedings below, Petitioners challenged as *per se* antitrust violations certain long-established practices to deter the immediate resale (known as "flipping") of shares received in the distribution of initial and secondary public offerings. Petitioners alleged that the Respondents had engaged in an antitrust conspiracy by adopting policies to deny allocations in future initial public offerings to retail brokerage customers who "flipped" their IPO shares rather than holding those shares for long-term investment. The district court dismissed Petitioners' claim on the ground of implied antitrust immunity and the United States Court of Appeals for the Second Circuit affirmed. In rejecting Petitioners' claim, the courts below concluded that the Securities and Exchange Commission ("SEC") had the authority to regulate or prohibit the challenged practices, but with knowledge that firms such as Respondents were taking action to deter flipping, had deliberately determined to allow such conduct to continue subject to monitoring by the SEC. Accordingly, both courts held that the challenged practices were immune from antitrust challenge based on the doctrine of implied immunity, as established in particular in the Court's decision in

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1. Respondents are: Coburn & Meredith; Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation); Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown, Inc.); Donaldson, Lufkin & Jenrette, Inc.; Goldman, Sachs & Co.; Lazard Freres & Co. LLC; Legg Mason Wood Walker, Incorporated; Merrill Lynch & Co., Inc.; Morgan Keegan & Company, Inc.; Morgan Stanley (f/k/a Morgan Stanley Dean Witter & Co.); NationsBanc Montgomery Securities LLC; NatWest Securities; Prudential Securities Incorporated; Raymond James & Associates, Inc.; Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.); Shamrock Partners, Ltd.; and UBS Financial Services Inc. (f/k/a UBS PaineWebber Inc., f/ka/ PaineWebber, Inc.).

United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975).

This case does not merit the granting of a petition for a writ of certiorari under the considerations outlined in Supreme Court Rule 10. In their brief, Petitioners do not contend that there is any conflict among the Circuit Courts of Appeals that would warrant the issuance of a writ of certiorari, nor could they. No issue of constitutional or other significance is raised in this case that would merit this Court's attention. Indeed, Petitioners disagree only with the conclusions of the district court and court of appeals, but do not dispute that they properly articulated the applicable rule of law. A petition that merely challenges the application of a properly stated rule is "rarely granted" by this Court. Sup. Ct. R. 10.

Instead of providing reasons why the Court should grant their petition, Petitioners predicate their argument on an untenable distinction between the "distribution" and "aftermarket" phases of public offerings of securities. They concede that, under the implied immunity principles established by this Court, the challenged conduct is immune from antitrust challenge during the distribution phase (Pet. 12-13), but contend that what they term the aftermarket phase is factually different and therefore should result in a different application of those same principles. Both the district court and the court of appeals expressly rejected this alleged factual distinction for purposes of determining whether the immunity doctrine applied and held that the same principles applied regardless of the "phase" in which the challenged conduct occurred. Moreover, the SEC – the agency charged with primary authority for the application and enforcement of the securities laws, including the conduct

at issue – submitted an *amicus* brief in the Second Circuit in support of affirmance of the district court's decision and concurring in the rejection of Petitioners' alleged factual distinction. For these and other reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

COUNTER-STATEMENT OF THE CASE

A. Petitioners' Claim

The syndicate system for underwriting fixed-price public offerings has been in wide use in the United States since the 1890s. Underwriters combine and agree among themselves, subject to numerous regulatory provisions governing such underwritings, to distribute securities to the public without violating the antitrust laws. *See United States v. Morgan*, 118 F. Supp. 621, 635-36 (S.D.N.Y. 1953). Petitioners, purporting to represent a class of retail investors in initial and secondary public offerings, nonetheless brought suit alleging a conspiracy among Respondent underwriters to "discourage" or "prevent" retail investors who bought stock in initial and secondary public offerings from reselling or "flipping" those shares for a period of 30-to-90 days. Petitioners alleged that this was accomplished by denying allocations in future initial public offerings to retail investors who "flipped" IPO shares during this period. (Am. Compl. ¶¶ 11, 60-63.) Petitioners allege that such practices amount to price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Petitioners did not allege that retail customers were actually prevented from selling their shares whenever they

wished. Nor did Petitioners contend that retail customers paid a different price in the offering than institutional customers. Instead, Petitioners claimed that the price of their shares was "artificially inflated" because the alleged conduct of the Respondents to discourage flipping by retail investors rendered their shares less valuable than the shares that institutional customers allegedly received for the same public offering price. (Am. Compl. ¶ 4.) To "facilitate" the alleged conspiracy, Respondents allegedly "encouraged the Depository Trust Corporation [sic] to develop an automated program whereby defendants could track the movement of public offering shares. . . ." (Am. Compl. ¶ 8.) The amended complaint failed to mention that the SEC approved the adoption of that system and, in doing so, expressly acknowledged that the system would facilitate the tracking of flipping in a certificateless environment. *See* SEC Release No. 34-37208, 61 S.E.C. Docket 2365, 2369 (May 13, 1996).

B. The Proceedings Below

Respondents moved to dismiss the complaint on various grounds for failure to state a claim upon which relief could be granted. In a memorandum opinion and order dated December 7, 2000, the United States District Court for the Southern District of New York (Buchwald, J.) granted Respondents' motion and dismissed the amended complaint with prejudice. *Friedman v. Salomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000) (Pet. App. 19a.). In an opinion the appellate court praised as "thorough and comprehensive," the district court found that Petitioners' antitrust claim was predicated on conduct that was lawful unless prohibited by the SEC because it was a "species of the 'pegging, fixing or stabilizing' of

securities [prices] over which the SEC has exclusive jurisdiction" under section 9(a)(6) of the Exchange Act and that the SEC's decision to permit that conduct (subject to its continuing oversight) created a clear repugnancy between the securities laws and the antitrust laws, giving rise to implied immunity from antitrust challenge. (Pet. App. 40a.) Petitioners moved for reconsideration, which was denied. *Friedman*, 2001 WL 64774 (S.D.N.Y. Jan. 23, 2001) (Pet. App. 15a.).

The United States Court of Appeals for the Second Circuit affirmed. (Pet. App. 14a.) Petitioners moved for rehearing and hearing *en banc*, but rehearing was denied and no judge requested a vote on whether to hear the case *en banc*. (Pet. App. 51a.) The parties and the court had agreed that the only issue raised by the appeal was "whether defendants' conduct [was] immune from antitrust enforcement" based on the authority and actions of the SEC under section 9(a)(6). (Pet. App. 5a.) After a review of this Court's trilogy of cases on the subject, the appellate court began by recognizing that this Court's decision in *NASD* was directly on point:

> "The facts in *NASD* are analogous to the case at bar because the statute in *NASD* 'authorizes funds to impose transferability or negotiability restrictions, subject to [SEC] disapproval.' Here, Section 9(a)(6) of the Exchange Act authorizes price stabilization mechanisms subject to SEC disapproval. The Supreme Court [in *NASD*] found that 'there can be no reconciliation of [the SEC's] authority under Section 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal per se,' even

though the SEC had not specifically approved the restrictive agreements." (Pet. App. 8a. (quoting *NASD*).)

The court of appeals then examined the "history of SEC regulation of price stabilization practice" and concluded that the SEC had indeed examined the issue of anti-flipping policies such as those challenged in the complaint "in both the distribution and aftermarket phases of public offerings." (Pet. App. 10a.) In so doing, the court noted that Congress was aware of these price stabilization practices when it passed the Exchange Act and did not prohibit them, instead opting to delegate regulatory power over them to the SEC in the form of section 9(a)(6). (Pet. App. 10a.) The court then cited SEC policy statements from 1940, 1953 and 1963, all of which made clear that the agency was aware of price stabilization practices, understood both the beneficial and problematic aspects of the practices, and on balance determined to permit, rather than prohibit, them. (Pet. App. 10a-11a (citing SEC Release Nos. 34-2446 (Mar. 18, 1940), 34-5194 (Jul. 5, 1955); H.R. Doc. No. 95, Pt. 1 (1963)).) In 1994, the SEC most explicitly addressed the issue of "flipping" in the aftermarket, but it again declined to prohibit price stabilization, deciding instead to monitor the situation and "'assess[] whether further regulation is warranted.'" (Pet. App. 11a (quoting SEC Release No. 34-37094, at 1740 (Apr. 11, 1996)).)

The court of appeals agreed with Respondents that "this history demonstrates that the SEC studied price stabilization and flipping repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain." (Pet. App. 12a.) The court specifically

rejected what it termed Petitioners' "artificial distinction" between activities in the aftermarket and in the distribution phase. The court recognized that actions and policies to deter flipping "pre-dated the Exchange Act and the SEC" (Pet. App. 12a), and that with the technological advances of recent years,

> "distributions have taken shorter and shorter periods of time [and] the problem of flipping – and its 'solution' of price stabilization – simply has spilled into the aftermarket as well as the distribution period. The SEC explicitly recognized this trend in its 1994 release . . . [yet] still declined to regulate price stabilization in the aftermarket when it adopted Regulation M, and we find this decision to be both deliberate and significant." (Pet. App. 12a.)

Thus, the court concluded that "Plaintiffs cannot contend that this latest action [by the SEC] concerned only distributions and not the aftermarket." (*Id.*) Insofar as they had contended that there was no inconsistency between the antitrust laws and the securities laws here because the latter also prohibited the challenged conduct, the court observed that Petitioners had "given an opposite meaning to section 9(a)(6)" and that, in fact, the statute "allows price stabilization practices that the SEC does not prohibit." (Pet. App. 13a-14a.) The court thus affirmed the District Court's decision, holding that "once the correct interpretation of section 9(a)(6) is in place – the interpretation that the District Court and defendants espouse – a finding of implied immunity is the direct consequence." (Pet. App. 14a.)

C. The SEC's Position

In counterpoint to Petitioners' assertion that the SEC has taken no position with regard to the anti-flipping practices at issue, the SEC submitted an *amicus* brief in the Second Circuit in which the agency argued that implied immunity barred Petitioners' antitrust claims and urged the court to reject Petitioners' appeal.

In its *amicus* brief, the SEC argued that section 9(a)(6) of the Exchange Act and other statutory provisions "grant the Commission plenary authority to regulate stabilization – or to refrain from regulating certain types of stabilizing conduct." (Brief of the Securities and Exchange Commission, *Amicus Curiae*, In Support of Appellees ("SEC Amicus Brief"), at 14.) In response to Petitioners' characterization that the failure to ban such practices was nothing more than "conscious neglect," the SEC recounted more than 60 years of agency consideration of stabilization practices, including policies to deter flipping, and in particular, its recent adoption of Regulation M, where the Commission decided "not to propose regulations explicitly governing aftermarket activities intended to stabilize the price of newly offered securities, but instead to gather data to the extent and nature of certain of those activities in order to allow it to determine whether regulation is appropriate." (SEC Amicus Brief, at 24-27). Moreover, the SEC pointed out the inherent fallacy in Petitioners' position:

> "Plaintiffs seem to contend that conduct is permissible only if the Commission has adopted a regulation specifically permitting it, but that conclusion is contrary to the language of the relevant statutes, and it would give the

> Commission the impossible task of not only identifying every type of stabilizing conduct that it is regulating, but also of exhaustively listing all the sorts of stabilizing conduct that it is not regulating, and even of anticipating the development of new practices. As previously shown, the Commission has not chosen specifically to bar or regulate it. That is not 'conscious neglect;' it is considered policy." (SEC Amicus Brief, at 35.)

REASONS FOR DENYING THE WRIT

Petitioners do not invoke any of the factors ordinarily considered by the Court in deciding whether to grant a petition for a writ of certiorari. Petitioners do not attempt to argue that the court of appeals has "entered a decision in conflict" with either another court of appeals or a state court of last resort. Sup. Ct. R. 10(a). Petitioners cannot contend either that the court of appeals decided "an important question of federal law that has not been settled by this Court" or that "conflicts with the relevant decisions of this Court." Sup. Ct. R. 10(c). To the contrary, this case involves a proper application of this Court's decision in *NASD*, in which the Second Circuit clearly held that section 9(a)(6) of the Exchange Act authorized the anti-flipping practices at issue, subject to SEC disapproval. As in *NASD*, the SEC was well aware of the challenged practices and elected not to prohibit them.

Petitioners merely repeat the same factual argument regarding the exact boundaries of the SEC's regulatory efforts regarding anti-flipping practices that has already been rejected by both the district court and court of appeals. They argue that the SEC has authorized stabilization practices

only as part of the initial distribution of securities, but not in the so-called "aftermarket" for these securities. (Pet. 13-17.) Petitioners make no serious effort to explain why what the courts below termed a "fairly fact-specific inquiry" (Pet. App. 6a) is of sufficient importance to require the Court's attention. Indeed, petitions of this sort, where the lower court has properly stated a rule but Petitioners contend that the court has either misapplied it or arrived at erroneous factual conclusions, are "rarely granted." Sup. Ct. R. 10. Moreover, as explained below, there is simply no significance for purposes of the implied immunity doctrine to Petitioners' factual distinction between the initial distribution of securities and the aftermarket for these securities. The SEC has long been aware of stabilization practices in the so-called aftermarket but has elected not to regulate or prohibit these practices. For this reason, and because the petition raises no issues worthy of the attention of this Court, the petition should be denied.[2]

A. The Implied Immunity Doctrine

Implied immunity analysis in the field of securities regulation is governed by the principles established in three decisions of this Court: *Silver v. New York Stock Exchange,*

2. In a strained effort to justify review by this Court, Petitioners note that the appellate opinion in this case has been cited favorably in one other Second Circuit opinion and has been cited by defendants in motions to dismiss in three other cases pending in the Southern District of New York. (Pet. 3 & n.1.) These facts hardly demonstrate that this matter is worthy of certiorari. Moreover, after the present petition was filed, motions to dismiss on implied immunity grounds were denied in two of the three cited cases (No. 00 Civ. 7804 and No. 98 Civ. 7890). Petitioners' counsel is also counsel for the putative plaintiff classes in those two cases.

Inc., 373 U.S. 341 (1963); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

In *Silver*, which involved an antitrust challenge to the NYSE's denial of its members' request for direct telephone connections to non-members located in Texas, the fundamental question presented was "whether the Securities Exchange Act ha[d] created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws." *Silver*, 373 U.S. at 347. This Court focused on whether the SEC had power to regulate the conduct at issue – specifically, enforcement of exchange rules – and held that since it did not, there was no implied immunity from the antitrust laws in that case. The Court stated, however, that if "review of [the challenged conduct] [had been] provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would [have been] presented." *Id.* at 360.

This Court refined its implied immunity analysis in *Gordon*, which challenged the system of fixed commission rates maintained by the American and New York Stock Exchanges. Based on an extensive review of the legislative and regulatory history relating to commission rates in the securities industry, the Court (affirming the decision of the Second Circuit) determined that the challenged conduct was immune from antitrust challenge. In doing so, the Court rejected the contention of the Justice Department that immunity could be implied only where there was a "pervasive regulatory scheme," and instead held that the doctrine also applied where the SEC has been vested with specific regulatory authority over the activity at issue and has exercised that authority. *Gordon*, 422 U.S. at 688-89.

In *NASD*, a companion case to *Gordon* with significant similarities to this one, the Court reviewed a Justice Department challenge to various restrictions imposed by mutual funds on the resale of mutual fund shares by investors. The Court held that implied immunity was not limited to situations where, as in *Gordon*, an agency has expressly regulated challenged conduct, but could also apply where an agency has been delegated exclusive responsibility over an area and has elected not to impose restrictions. In *NASD*, the Court held that implied immunity was dictated by section 22(f) of the Investment Company Act, which authorized mutual funds to impose restrictions on secondary trading as long as those restrictions did not contravene such "rules and regulations as the Commission may prescribe." *NASD*, 422 U.S. at 720-21 (quoting 15 U.S.C. § 80a-22f).

NASD is particularly apposite given the strikingly similar language of the statute at issue in that case and of section 9(a)(6) of the Exchange Act, applicable here. The statute at issue in *NASD* prohibited mutual funds from restricting "the transferability or negotiability" of their shares "in contravention of such rules and regulations as the [SEC] may prescribe." *See* 15 U.S.C. § 80a-22(f). As Petitioners do here, the Justice Department had argued in *NASD* that implied immunity was not available because the SEC had never issued express regulations permitting the challenged secondary trading restrictions. *Id.* at 726. The Court rejected this argument, concluding that "[t]he Commission's acceptance of [these] restrictions for more than three decades hardly represent[ed] abdication of its regulatory responsibilities." *Id.* at 728. "The SEC's election not to initiate restrictive rules or regulations," the Court reasoned, reflected "an informed administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the

problems of the industry" and constituted "precisely the kind of administrative oversight . . . that Congress contemplated when it enacted [section] 22(f)." *Id.* A determination that the challenged agreements were immune from liability under the Sherman Act therefore was warranted because there was "no way to reconcile the Commission's power to authorize [them] with the competing mandate of the antitrust laws." *Id.* at 721-22; *see also id.* at 729-30 ("[i]n this instance the antitrust laws must give way if the regulatory scheme established by [Congress] is to work.").

Here, section 9(a)(6) prohibits transactions "for the purpose of pegging, fixing, or stabilizing the price of" securities that are "*in contravention of such rules and regulations as the Commission may prescribe. . . .*" 15 U.S.C. § 78i(a)(6) (emphasis added). As with the provision at issue in *NASD*, section 9(a)(6) of the Exchange Act clearly *permits* transactions undertaken for the purpose of pegging, fixing or stabilizing the price of securities, "subject to Commission disapproval," *NASD*, 422 U.S. at 726, thus (as in *NASD*) expressly supplanting the "paradigm of competition" in this respect. And as in *NASD*, the SEC's determination – in the course of its decades-long scrutiny of anti-flipping practices in the "aftermarket" – not to adopt specific regulations with regard to the conduct Petitioners challenge "hardly represents abdication of its regulatory responsibilities." *NASD*, 422 U.S. at 728. To the contrary, it unquestionably reflects "an informed administrative judgment" that the current state of regulation of that activity strikes the appropriate balance. *Id.*[3]

3. *See also Finnegan v. Campeau Corp.*, 915 F.2d 824, 831 (2d Cir. 1990) ("That the SEC has chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices once shareholders are properly informed of them, does not reduce the SEC's supervisory authority over such agreements.").

As the district court correctly observed, "implied immunity may be found not only where an administrative agency has regulated, but also where it has scrutinized conduct over which it has clear regulatory authority and has consciously chosen to allow the conduct to continue unregulated." (Pet. App. 17a (citing *NASD*).)

Under *NASD*, immunity from the antitrust laws will be implied where (i) Congress has granted the SEC authority over the conduct at issue and the SEC has exercised that authority, whether by permitting the conduct, regulating it or otherwise, and (ii) the application of the antitrust laws would be inconsistent with the actual or potential exercise of the SEC's authority to regulate the conduct and could thus subject the defendants to conflicting standards. Both conditions are met here, and this case is therefore governed by *NASD*, as the court of appeals held.

B. Section 9(a)(6) Provides the SEC with Direct Authority to Regulate the Conduct at Issue, Which the SEC Has Exercised

1. Statutory Authority

In enacting the Exchange Act, Congress provided the SEC with direct regulatory authority over all the conduct challenged in the amended complaint. Congress was aware of the widespread use of price stabilization measures to facilitate the distribution of new offerings. Because those measures were in common use and the evidence regarding their economic effects was unclear, Congress decided to "proceed cautiously" and not to outlaw such conduct outright. *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934); *see also* S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934).

Instead, Congress authorized stabilizing activities, subject to SEC regulation, through section 9(a)(6), which provides that:

> "It shall be unlawful for any person, directly or indirectly . . . (6) To effect either alone or with one or more persons any series of transactions for the purchase and/or sale of any security registered in a national securities exchange for the purpose of pegging, fixing or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78i(a)(6).

The plain language of section 9(a)(6) authorizes the SEC to permit, prohibit, or regulate the challenged price stabilization practices at issue in this case. As the SEC has observed, in enacting section 9(a)(6) "Congress recognized the need for an adjustment between the interest of purchasing investors on the one hand and the needs of industry for capital funds on the other" and "assigned to [the] Commission the duty of finding a reasonable middle ground between those two objectives which are by no means always easy to reconcile." SEC Release No. 34-2446 (Mar. 18, 1940). The SEC has interpreted its authority under section 9(a)(6) as directing it to consider "all aspects of stabilization problems," including the disruptive effects of "flipping" and the practices employed by underwriters to reduce its occurrence. For over sixty years, pursuant to section 9(a)(6), the SEC has been studying the issues of stabilization and "anti-flipping" activities and, through policy statements,

releases and regulations, has been defining and refining the permissible scope of those practices. *See, e.g., id.*, SEC Release Nos. 33-7057, 34-33924, 56 SEC Docket at 1315-16 (Apr. 19, 1994); SEC Release Nos. 33-7282, 34-37094, 61 S.E.C. Docket 1713, 1737-39 (Apr. 11, 1996); *In re National Ass'n of Sec. Dealers, Inc.*, 19 S.E.C., 424, 460-61 (1945).

Petitioners here do not seriously argue that the SEC lacks statutory authority to issue express regulations, should it wish to do so, either permitting or prohibiting the very same practices they seek to challenge under the antitrust laws. (Pet. 10 (acknowledging "the possibility that the Commission might someday introduce rules" regulating price stabilization in the aftermarket).)[4] There being no room for argument that the SEC lacks statutory *authority* to deal with the challenged anti-flipping conduct, the only remaining question under *NASD* is whether the SEC has exercised its "informed administrative judgment" not to issue express regulations on the subject.

2. SEC Exercise of Its Authority

The district court engaged in a lengthy and comprehensive discussion, later adopted by the court of appeals, that described decades of scrutiny by the SEC of anti-flipping activities pursuant to its exclusive authority to regulate such practices under section 9(a)(6) of the Exchange Act. (Pet. App. 30a-40a; Pet. App. 10a-11a.) There is no need for this Court to revisit and review the thorough historical exegesis undertaken by the courts below. Nevertheless, even

4. Petitioners make a half-hearted suggestion in a footnote (Pet. 10 & n.6) that such rules "might" exceed the SEC's authority but have never offered any analysis to support this suggestion.

a brief review of the history of the SEC's actions with respect to anti-flipping activities demonstrates conclusively that the SEC has made the informed administrative judgment not to impose restrictions on the challenged practices in this case because those practices have beneficial effects, including reducing volatility and otherwise facilitating the orderly distribution of securities.

In 1940, the SEC issued its first (and still authoritative) policy statement on the question of regulating the price-stabilization of public offerings. *See* SEC Release No. 34-2446 (March 18, 1940). Describing the practice as "an integral part of the American system of fixed-price security distribution," *id.* at 9, the SEC elected to "adopt a program for the regulation of stabilization" rather than flatly prohibiting or permitting stabilization in all circumstances. *Id.* at 2. In adopting this approach, the SEC recognized that the two principal benefits of the syndicate system of security distribution – (1) "the element of certainty to the issuing corporation" and (2) "the element of speed, reflected . . . in the rapid sale of the issue to the public and in the consequent promptness of payment by the underwriters to the issuer" – were both dependent upon underwriters having the ability, when necessary, to engage in price stabilization. *Id.* at 4-5. Specifically addressing conduct now called "flipping," the SEC also recognized that underwriters employed stabilization measures to counteract the disruptive effects of "'free riders' or 'speculators' who purchase [an issue] with the hope of quickly selling out and taking a profit from an early rise [in the price]." *Id.*[5]

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5. *See also id.* at 8 (recognizing possibility that "'free riders,' as well as other buyers who change their minds, will sell . . . at a time when there is a temporary imbalance between supply and demand

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Later, in its 1963 Special Study of Securities Markets, the SEC observed that, in order to encourage long-term investment, underwriters adopted practices to discourage investors from reselling new issues "for varying periods, usually 30 to 60 days." H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 526 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3013, 3017 (May 19, 1964). The 1963 study reported that penalties were imposed on salesmen or customers for flipping during that period, including revocation of salesmen's commissions and denial to investors of allotments in future public offerings. *Id.* at 525 & n.104.[6] According to the 1963 report, "[f]irms 'flagged' or identified customers who sold stock in the immediate after-market by reviewing transfer sheets; those who sold were unlikely to receive allotments of subsequent oversubscribed issues." *Id.* Salesmen were typically penalized by the withholding of their commissions if their customers resold during the post-offering period. *Id.* This is *precisely* the conduct that Petitioners challenged as an antitrust violation in the amended complaint. (*See* Am. Compl., ¶¶ 60, 67.) Yet restrictions on such practices were not included among the report's 208 recommendations for regulatory or legislative action.

More recently, in connection with the adoption of Regulation M (17 C.F.R § 242.104) in 1996, the SEC

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created by the offering" and that "[t]hese scattered market sales, . . . unless counteracted, will exert a market influence which, according to the underwriters, is all out of proportion to their real significance").

6. *See also id.* at 525 (reporting that "[c]ustomers found to have resold their allotments 'within a relatively short period' are not considered to be investors . . . [and were] not able to obtain allotments of subsequent underwritings of the firm").

conducted a "comprehensive review" of stabilization practices – directing particular attention to "aftermarket activities," and observing that "'stabilization' of the market may have shifted from the sales period to the aftermarket period." *See* SEC Release No. 33-7057, 34-33924, 56 S.E.C. Docket 1302 (Apr. 19, 1994). The final rules adopted by the SEC imposed new disclosure and record-keeping requirements on certain "aftermarket" activities – in particular, the use of short covering transactions and "penalty bids" by underwriting syndicates – but did not impose such obligations with respect to the anti-flipping practices at issue here. *See* SEC Release Nos. 33-7375, 34-38067, 63 S.E.C. Docket 1141, 1170 (Dec. 20, 1996).[7]

Petitioners are thus plainly incorrect in claiming that the SEC "explicitly declined to immunize" stabilization activity in the "aftermarket" for securities as part of Regulation M. (Pet. 5, 6, 15-16.) Instead, in adopting Regulation M, the SEC imposed new record keeping and disclosure obligations on certain aftermarket activities (e.g., penalty bids) and specifically rejected suggestions that it take stronger measures, deciding that the new requirements were

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7. Short covering transactions are the placing of a bid or the effecting of a purchase on behalf of the sole distributor or the underwriting syndicate to reduce a syndicate short position. A penalty bid is an arrangement that permits the managing underwriter to reclaim a selling concession otherwise owed to a syndicate member when securities sold by that member are purchased in syndicate covering transactions. (*Friedman*, Pet. App. 22a-23a.) The purpose of a penalty bid is to "encourage syndicate members to sell the securities to those persons who intend to hold them rather than engage in short-term profit-taking, i.e., to combat flipping." *See* SEC Release Nos. 33-7282, 34-37094, 61 S.E.C. Docket 1713, 1740 (Apr. 11, 1996).

"an appropriate and effective means to monitor developments in [these] aftermarket activities," while noting that it might impose additional regulation in the future. 63 S.E.C. Docket at 1170. Thus, as the district court and court of appeals correctly concluded, the proffered distinction between distribution and aftermarket does not advance Petitioners' argument. The SEC is just as aware of "aftermarket" stabilization activities as stabilization activities undertaken in initial distributions and has exercised its informed judgment concerning the regulation of both types of activities.

This conclusion is reinforced by the SEC's contemporaneous decision in 1996 to approve the adoption of the Depository Trust Company ("DTC") Tracking System – a system designed in part to *facilitate* the monitoring of "flipping" in an era when stock certificates were being replaced by book-entries of securities ownership. In approving this system, the SEC not only recognized that it would enhance the ability of syndicate managers to impose penalty bid arrangements and track customer flipping but expressly *endorsed* this feature of the system. *See* SEC Release No. 34-37208, 61 S.E.C. Docket 2365, 2369 (May 13, 1996) ("[b]y facilitating a lead manager's ability to track flipping of IPOs in a book-entry environment," DTC Tracking System would encourage underwriters to use the book-entry system, "further[ing] efficiencies and safety in the clearance and settlement of securities transactions").

C. The Court of Appeals Correctly Held that Implied Immunity Bars Petitioners' Antitrust Claim

The inconsistency prong of the implied immunity test is also met here. Implied immunity from antitrust challenge is necessary given the express delegation to the SEC, in section 9(a)(6), of authority to issue "such rules and regulations as

[it] may prescribe as necessary and appropriate" concerning anti-flipping practices both during the distribution of an offering and in the "aftermarket." The SEC has recognized its responsibility over this area, has observed the use of practices identical to those challenged by Petitioners here, and has allowed those practices to continue to protect investors and promote capital formation. Indeed, as mentioned above, the SEC has expressly stated that it has considered the issue of price stabilization specifically in the context raised by Petitioners and has decided to maintain the "considered policy" of declining regulation. Given the SEC's "considered policy" to allow such conduct to continue, the court of appeals correctly found that Respondents would be subject to conflicting standards under the antitrust laws and the securities laws if immunity from the antitrust laws were not inferred.[8]

Petitioners do not dispute the court of appeals' statement of the rule of law that pursuant to section 9(a)(6), the SEC

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8. Petitioners' claim that the SEC failed to consider the impact of aftermarket price stabilization on competition is misplaced. (Pet. 20-22.) The SEC is charged with considering competition issues, *see* 15 U.S.C. § 78c(f), 78w(a)(2), and has repeatedly done so in connection with the analysis of stabilization practices. *See, e.g.*, 63 S.E.C. Docket at 1172 (noting that Commission is required to "consider the anti-competitive effects of any rules it adopts" and concluding that Regulation M "would not likely impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act"). Moreover, the premise of section 9(a)(6), endorsed repeatedly over the decades by the SEC, is that stabilization practices are often desirable and essential to the efficient distribution of securities. Only those practices specifically identified as pernicious by the agency are prohibited. Permitting Petitioners to pursue antitrust claims under these circumstances would turn section 9(a)(6) on its head.

has the authority to permit the conduct at issue in this case. (Pet. 10.) Petitioners' disagreement with the court of appeals' decision concerns only whether the SEC has in fact exercised that authority, or whether the SEC has engaged in mere "speculation" (Pet. 10.), about the question of anti-flipping practices. This case, then, revolves around a factual question that requires an examination of the history of SEC regulation and commentary to divine what the SEC's intentions are with regard to flipping in the aftermarket. The district court and court of appeals engaged in this fact-finding effort, and both concluded that the history of SEC commentary in this area mandates the conclusion that, as Respondents contended, "the SEC studied price stabilization and flipping repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain." (Pet. App. 11a-12a.)

Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, where Petitioners do not dispute that the district court and court of appeals correctly stated the rule of law – that section 9(a)(6) permits price stabilization subject to SEC disapproval and that under *NASD* there is immunity from the antitrust laws even where the SEC has made a considered judgment not to adopt express rules in an area committed to its authority by Congress – Petitioners have not come close to showing why this case raises such important and unique issues that the Court should entertain a petition that would ordinarily be "rarely granted."

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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